162 U.S. 283

TRANSCRIPT OF RECORD.

162-283

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~169~~. 180

THE SENECA NATION OF INDIANS, PLAINTIFF IN ERROR,

vs.

HARRISON B. CHRISTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED OCTOBER 29, 1892.

(15,182.)

(15,182.)

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

THE SENECA NATION OF INDIANS, Appellant,
vs.
HARRISON B. CHRISTY, Respondent.
} Action in Ejectment.

Case.

James C. Strong, attorney and of counsel for appellant.
Sprague, Morey & Sprague, attorneys for respondent.
Norris Morey, of counsel.

1 Supreme Court, General Term, Fifth Department.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS, Appellants,
against
HARRISON B. CHRISTY, Respondent.
} Statement.

2 *Statement.*

This action was commenced by the service of a summons on the defendant on the 13th day of October, 1885. The complaint was served on the 3d day of December, 1885, and on January 12, 1886, the answer was served. The issues came on for trial before the Hon. Henry A. Childs, one of the justices of said court, and a jury, at the city of Buffalo, in the county of Erie, in the State of New York, on the 11th day of April, 1887. The court directed a verdict in favor of the defendant, to which direction the plaintiff duly excepted.

An appeal was thereafter taken to the general term of said court.

That the above-named plaintiff and defendant were the original parties to this action, and that there has been no change of parties during the pendency of this action.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS, Plaintiff,
against
HARRISON B. CHRISTY, Defendant.
} Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this
3 action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of such service; and in case of your fail-

ure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated October 12th, 1885.

JAMES C. STRONG,
Plaintiff's Attorney.

Office and post-office address, No. 41 East Seneca street, Buffalo, N. Y.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS *against* HARRISON B. CHRISTY. } Complaint.

The above-named plaintiff, "The Seneca Nation of Indians," by James C. Strong, its attorney, complains of the above-named defendant, Harrison B. Christy, and alleges—

That said plaintiff is now, and from time immemorial has been, lawfully seized of an estate in possession, and entitled to the immediate possession and occupancy of the following-described land and premises, to wit:

All that certain piece or parcel of land situate, lying and being in the town of Brant, county of Erie, and State of New York, and known and distinguished as being lot number twenty-five (25) in the tract of land known as being the three thousand eight
4 hundred and forty acre tract taken from the Cattaraugus Indian reservation, as surveyed by James Read, surveyor, and commonly known as the mile strip in the said town of Brant, and containing one hundred acres. That the defendant is in the wrongful and unlawful possession of the said land and premises, and wrongfully and unlawfully withholds the same from this plaintiff.

Wherefore the plaintiff demands judgment for the possession of said premises, and for the sum of two thousand dollars damages sustained by the plaintiff for withholding the same from the said plaintiff, together with the costs of this action.

JAMES C. STRONG,
Attorney for Plaintiff, No. 41 East Seneca Street, Buffalo, N. Y.

STATE OF NEW YORK, *County of Erie, City of Buffalo,* } *ss.:*

Joseph Hemlock, being duly sworn, says that he is the president of the plaintiff named in the above-entitled action. That he has heard read the foregoing complaint signed by James C. Strong, its attorney, and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated to be alleged on information and belief, and as those matters he believes it to be true.

his
JOSEPH x HEMLOCK.
mark.

Sworn to before me this 1st day of December, 1885.

HENRY W. BRENDEL,
Notary Public in and for Erie Co., N. Y.

5 Supreme Court, Erie County.

THE SENECA NATION OF INDIANS *against* HARRISON B. CHRISTY. } Answer.

And now comes the defendant above-named, by Sprague, Morey & Sprague, his attorneys, and for answer to the complaint herein avers as follows, to wit:

1st. He denies each and every allegation contained and set forth in the complaint.

2d. The defendant alleges that the plaintiff, its ancestor, predecessor or grantor, was not seized or possessed of the premises described in the complaint, or any part thereof, within twenty years before the commencement of this action; and the defendant further alleges in that behalf, that himself and those under whom he claims entered into the possession of the premises described in the complaint under claim of title, exclusive of any other right, founding the claim upon a written instrument as being a conveyance of the premises in question; and that there has been a continued occupation and possession of the premises included in such written instrument for more than twenty years under the same claim.

3d. The defendant, further answering, alleges, upon information and belief, that the plaintiff has not the legal right, capacity or authority to maintain an action for the possession of the premises described in the complaint.

4th. The defendant, further answering, and by way of counterclaim, alleges that he is the owner, and seized in fee of the premises described in the complaint herein, and that he holds it as
6 grantee and purchaser under and by virtue of a deed of conveyance thereof from Joseph L. Christy and Dianna, his wife, duly executed to him on or about the 15th day of April, 1870; that said premises, at the commencement of this action, were and for the three years next preceding had been in his actual possession; that the plaintiff unjustly claims an estate therein in fee in possession.

Wherefore the defendant demands judgment dismissing the complaint herein; and that the plaintiff, and every person claiming under it, be forever barred from all claim to any estate of inheritance or freehold, or for a term of years not less than ten, in possession, reversion or remainder in the said premises described in the complaint herein, together with defendant's costs and disbursements in and about the defense of this action.

SPRAGUE, MOREY & SPRAGUE,
Attorneys for Defendant, 377 Main Street, Buffalo, N. Y.

COUNTY OF ERIE, *ss:*

Harrison B. Christy being duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HARRISON B. CHRISTY.

Sworn to before me this 11th day of January, 1886.

CHARLES H. KEEP,
Notary Public, Erie Co., N. Y.

7 *Clerk's Minutes.*

At a circuit court, held at the city and county hall, in the city of Buffalo, in and for the county of Erie, on the 11th day of April, 1887.

Present: Hon. H. A. Childs, justice, presiding.

THE SENECA NATION OF INDIANS *against* HARRISON B. CHRISTY. } James C. Strong. Sprague, Morey & Sprague.

Jury.

Henry Barney.	Carl Schell.
Joseph Mergenhagen.	Alexander Hofheins.
Andrew Lair.	John G. Miller.
Frank Moore.	William E. Lyman.
Philip Fink, Jr.	H. W. White.
Geo. A. Jahraus.	Jacob Miller.

Plaintiff's witnesses: John Kennedy.

Evidence closed.

Defendant's counsel moves court to direct verdict for defendant. Motion granted. By direction of court, the jury say they find for the defendant, "No cause of action."

F. S. EWELL,
Sp. Dp. Clerk.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS *against* HARRISON B. CHRISTY. } Judgment.

8 The issues in the above-entitled action having been regularly brought on for trial before the Hon. Henry A. Childs and a jury, at a circuit term of the supreme court, held in

and for the county of Erie, at the city and county hall at Buffalo, N. Y., on the 11th day of April, 1887, and said issues having been tried, and a verdict for the defendant, of no cause of action, having been duly rendered on said last-named day, and the defendant's costs having been duly taxed after due notice of taxation at the sum of $396.36, now, upon motion of Sprague, Morey & Sprague, attorneys for the above-named defendant, it is—

Ordered and adjudged that the plaintiff take nothing by his complaint herein, and that the defendant recover of said plaintiff the said sum of $396.36, and his costs of this action.

Dated Buffalo, N. Y., July 2d, 1887.

Judgment signed July 5th, 1887.

C. A. ORR, *Clerk.*

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS, Appellant,
against
HARRISON B. CHRISTY, Respondent. } Notice of Appeal.

Please take notice that the plaintiff, The Seneca Nation of Indians, in the above-entitled action, appeals to the general term of the supreme court from a judgment entered herein, in the clerk's office of Erie county, on the 5th day of July, 1887, in favor of the
9 defendant and against the plaintiff, to the effect that the plaintiff takes nothing by its complaint, and that the defendant recover of said plaintiff the sum of $396.36, for costs, and from the whole thereof.

Dated July 15th, 1887.

Yours, &c.,

JAMES C. STRONG,
Att'y for Pl'ff and App'l't.

To Messrs. Sprague, Morey & Sprague, att'ys for def't and resp'd't, and C. A. Orr, Esq., clerk of the county of Erie.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS, Appellant,
against
HARRISON B. CHRISTY, Respondent. } Case Containing Exceptions.

The issues in this action came on for trial before the Hon. Henry A. Childs, one of the justices of said court, at a circuit term of said court, held at the city of Buffalo, in the county of Erie, and State of New York, on the 11th day of April, 1887.

A jury having been called and sworn, the plaintiff, by its attorney, opened the case.

The plaintiff then, to maintain the issues upon its part, offered the following stipulation of facts, stipulated and admitted for the purposes of this action:

10 Supreme Court, Erie County.

THE SENECA NATION OF INDIANS
against
HARRISON B. CHRISTY. } 1st Stipulation.

The following facts are stipulated and admitted for the purposes of the trial of this action, to wit:

That all the right, title and interest of the State of Massachusetts in and to the premises described in the complaint, and to other lands, was conveyed by said State to Robert Morris, by deed dated May 11, 1791, and recorded in Erie county clerk's office, in Liber 24 of Deeds, at page 415; and by another deed bearing same date, recorded in Liber 24 of Deeds, at page 418, which records or duly certified copies thereof may be read in evidence at the option of either party.

By sundry mesne conveyances from said Robert Morris, the title of the State of Massachusetts in and to said premises was duly conveyed to, and vested in, Wilhelm Willink and others (who constituted what is commonly known as the Holland Land Company) on or before February 18th, 1801, and thereafter, and previous to August 31st, 1826, the same title to said premises had been, by sundry mesne conveyances, duly conveyed to and vested in Robert Troup, Thomas L. Ogden and Benjamin W. Rogers (commonly known as the Ogden Land Company); that prior to August 31st, 1826, the lands described in the complaint had been a portion of what was known as the Cattaraugus Indian reservation from the time said reservation was set apart or reserved, to wit, 1797, and from time immemorial had been occupied and in possession of a portion of the Seneca nation or tribe of Indians; that since
11 the making of the "treaty" or conveyance of August 31st, 1826, hereinafter mentioned, the remainder of said Cattaraugus reservation not purporting to be sold and conveyed by said "treaty" or conveyance, has continued in the possession of said Seneca nation of Indians.

That on August 31st, 1826, a so-called "treaty," or conveyance, was made and executed by "the sachems, chiefs and warriors of the Seneca nation of Indians" to and with said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers; that said "treaty," or conveyance, was duly recorded on May 9th, 1827, in Erie county clerk's office, in Liber 10 of Deeds, at page 138; that the lands described in the complaint were embraced in the lands purporting to be granted, sold and conveyed by the said "treaty," or conveyance; that either party may read in evidence on the trial hereof the record aforesaid of said "treaty," or conveyance, or a duly certified copy thereof. That at the time of the making said "treaty," or conveyance, said Seneca nation of Indians had notice that said Troup, Ogden and Rogers had acquired the title of the State of Massachusetts thereto, as hereinbefore set forth.

That thereafter, and before the beginning of this action, by sundry mesne conveyances duly executed by said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, and their grantees, their title to

the premises described in the complaint was granted and conveyed to, and became vested in the defendant, and at the beginning of this action the defendant was in possession of said premises, claiming to own the same under and by virtue of such conveyances; that the record of any of said "treaties" or deeds of conveyance which are of record in Erie county clerk's office, and duly certified
12 copies of any of them which are on file or recorded in Erie county or elsewhere shall be competent evidence of the contents thereof, except the said so-called "treaty" of August 31st, 1826, which may be read in evidence, reserving, however, all questions as to its force and effect.

That soon after said August 31st, 1826, and prior to 1832, said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers entered into the full and exclusive possession of the lands described in said "treaty" or conveyance of August 31st, 1826, including the lands described in the complaint, which lands said "treaty" or conveyance purported to sell and convey to said Troup, Ogden and Rogers, and the possession thereof has ever since been held by the said Troup, Ogden and Rogers, and their several successive grantees, of the parcels into which the same was divided, including the defendant, claiming title thereto, exclusive of any other right, and founding such claim upon written instruments, as being conveyances of the premises in question, and taxes have been from year to year during that period assessed, levied and imposed thereon, by and for the county of Erie and State of New York, and the same have been paid by the several persons who have been in possession of said lands, claiming title thereto as aforesaid under said Troup, Ogden and Rogers.

The said "treaty" or conveyance from the said sachems, chiefs and warriors of the Seneca nation of Indians, of August 31st, 1826, was on February 24th, 1827, transmitted by the President of the United States to the Senate of the United States, and certain proceedings were had in respect thereto in and by the Senate
13 of the United States, which appear in volume 3 of the printed volumes entitled "Executive Journals."

Either party may read in evidence the account of said proceedings from said Executive Journal, or a duly certified copy thereof, and said printed volume, or such duly certified copy thereof, or of a part thereof, shall be competent evidence thereof.

The sum of $43,050.00 of the consideration set forth in said "treaty" or conveyance of August 31st, 1826, was deposited by said Troup, Ogden and Rogers in the Ontario bank at Canandaigua, Ontario Co., N. Y., under a deed of trust given by said bank, and dated April 21st, 1827, an authenticated copy of which may be read in evidence by either party upon the trial of this case, and the interest thereon was paid annually to, and received by, the said Seneca nation of Indians; that afterwards, and in the year 1855, said principal sum of $43,050.00 was, pursuant to section 3 of the act of Congress, approved June 27th, 1846, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with various

Indian tribes for the year ending June 30th, 1847," paid into the United States Treasury, and the lawful interest thereon has ever since been paid to, and received by, the said Seneca nation of Indians.

It is further stipulated that the printed volumes known as, and styling themselves, "United States Statutes at Large," with any printed appendix therein; the printed book known as, and styling itself, "Revision of Indian Treaties," and purporting to have been published in 1873, and the printed volume known as, and styling itself, "Indian Treaties to 1837;" also the printed volume known as, and styling itself, "American State Papers—Indian Af-
14 fairs;" also the printed volumes known as, and styling themselves, "United States Charters and Constitutions;" also the printed volumes known as, and styling themselves, "Executive Journal," and purporting to contain a printed record of the proceedings of the United States Senate in executive session, shall be, and each of them shall be competent evidence of anything stated or contained therein which shall be relevant or material upon the trial of this action.

Either party may, upon the trial of this action, produce any other competent evidence, documentary or oral, material and relevant to the issues herein.

Dated Buffalo, April 2d, 1887.

JAMES C. STRONG,
Attorney for Plaintiff.
SPRAGUE, MOREY & SPRAGUE,
Attorneys for Defendant.

The plaintiff then offered the following additional stipulation of facts, stipulated and admitted for the purposes of this action, to wit:

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS *against* HARRISON B. CHRISTY. } 2d Stipulation.

The following additional facts are stipulated for the purposes of the trial of this action, to wit:

That the Seneca nation of Indians considered that by the
15 "treaty" or conveyance dated August 31, 1826, they had disposed of all their right, title and interest in, and to the lands purporting to be sold thereby, to the grantees, the owners of the pre-emption right thereof, and thereupon the said Indians allowed the said grantees to enter into possession thereof, in pursuance of the said "treaty," or conveyance, and the said grantees entered into possession thereunder and in pursuance thereof, and they and their grantees have held possession thereunder ever since.

That the lands covered by said "treaty," or conveyance, including the premises in question in this action, have been conveyed from time to time by the said grantees named in said "treaty," or

conveyance of 1826, to persons who purchased the same for good and valuable considerations, in good faith, relying upon the title of their grantors under such "treaty," or conveyance.

That the defendant and the various persons through whom he claims title purchased the premises in question, for good and valuable considerations, in good faith, relying upon such title, and have occupied the same ever since about the year 1826, and have made extensive and valuable permanent improvements thereon, relying upon their said title, which was known to the said Indians, who ever since the said "treaty" have occupied the lands reserved to them therein and thereby, but who have not objected to the making of said improvements as aforesaid, and have made no claim to the said premises until the beginning of this action.

That the estimated area of the Cattaraugus reservation as specified in the "treaty" held at Buffalo Creek in January, 1838, between the Seneca Indians and the United States, and in the conveyance from the said Indians to Ogden and others referred to in
16 said treaty, and in the "treaty" held at Buffalo Creek in 1842, between the said Indians and the United States, does not include any lands covered by, and purporting to be sold by, and in the said "treaty" or conveyance of August 31, 1826.

That after the adoption of the Federal Constitution and before the execution of the "treaty," or conveyance of August 31st, 1826, the treaty of cession or agreement entered into between New York and Massachusetts in 1786, was formally and duly ratified and approved by the United States.

It is further stipulated and agreed that upon the trial of this action the witnesses produced by the defendant would testify to facts tending to show that the defendant and his various grantors have held the premises in question adversely to the plaintiff and all other persons under a claim of title founded upon written conveyances of the premises ever since the said treaty of 1826, and that they would also testify to facts tending to show that immediately after said treaty in 1826, the said Indians surrendered and abandoned the possession of the lands described in the said "treaty" to the owners of the right of pre-emption thereof, the grantees in said "treaty," or conveyance named, and it is further stipulated and agreed that this stipulation shall have and be given the same force and effect in all respects, as if such witnesses so testified upon the trial hereof and no other effect.

Dated Buffalo, April 11, 1887.

SPRAGUE, MOREY & SPRAGUE,
Attorneys for Defendants.

JAMES C. STRONG,
Attorney for Plaintiff.

The plaintiff here rested.

17 Defendant's counsel then read in evidence the grant from James the First, King of England, to the Plymouth council, dated A. D. 1620, from 1st U. S. Charters and Constitutions, pages 921 to 931. Also the grant from Charles the First to the governor

and company of Massachusetts Bay, 1st U. S. Charters and Constitutions, pages 932 to 942. Also a grant from William and Mary, King and Queen of England, in 1691, to the province of Massachusetts Bay. (1st U. S. Charters and Constitutions, pp. —.)

Also the grant from Charles the First, King of England, dated 1663, to the Duke of York and Albany, of the province of New York, extending from a line twenty miles east of the Hudson river westward indefinitely, and from the Atlantic ocean north, to the south line of Canada. (1st U. S. Charters and Constitutions, pp. —.)

It was admitted that the title to the lands described in the complaint, with all the other lands in the State of New York, which were granted by the several grants heretofore read in evidence on behalf of defendant, had been granted to, and were vested in, the States of Massachusetts and New York prior to December 16, 1786, and that a controversy had arisen prior to the last-mentioned date between the States of New York and Massachusetts in respect to the ownership of said lands by those States respectively.

Defendant's counsel read in evidence the treaty of cession entered into between the States of New York and Massachusetts, dated December 16, 1786, and recorded in Liber 26 of Deeds, in the Erie county clerk's office, at page 469.

The following are portions of said treaty of cession, to wit:

18 First. The Commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts hath to the government, sovereignty and jurisdiction of the land and territories so claimed by the State of New York, as hereinbefore stated, and particularly specified.

Secondly. The State of New York doth hereby cede, grant, release and confirm to the said Commonwealth of Massachusetts, and to the use of the Commonwealth, their grantees and the heirs and assigns of such grantees, forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the State of New York hath of, in and to two hundred and thirty thousand and four hundred acres, to be located by the Commonwealth of Massachusetts, and to be situate to the northward of and adjoining to lands granted respectively to David Cox and Robert Litten Hooper, and their respective associates, and between the Rivers Oswego and Chenango; and also of, in and to all the lands and territories within the following limits and bounds, that is to say:

Beginning in the north boundary line of the State of Pennsylvania, in the parallel of 42 degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the State of Pennsylvania, or Delaware river, as the said boundary line hath been run and marked by the commissioners appointed by the State of Pennsylvania and New York respectively, and from the said point or place of beginning, running on a due meridian north, to

19 the boundary line between the United States of America and the King of Great Britain; thence westerly and southerly

along the said boundary line to a meridian which will pass one mile due east from the northern termination of the strait or waters between Lake Ontario and Lake Erie; thence south along the said meridian to the south shore of Lake Ontario; thence on the eastern side of the said strait by a line about one mile distant from, and parallel to the said strait, to Lake Erie; thence due west to the boundary line between the United States and the Kingdom of Great Britain; thence along the said boundary line until it meets with the line of cession from the State of New York to the United States; thence along the said line of cession to the northwest corner of the State of Pennsylvania, and thence east along the northern boundary line of the State of Pennsylvania to the said place of beginning, and which said lands and territories so ceded, granted, released and confirmed are parcel of the lands and territories described in said petition.

Ninthly. That the Commonwealth of Massachusetts may from time to time, by persons to be by them authorized for the purpose, hold treaties and conferences with the native Indians, relative to the property or right of soil of the said lands and territories hereby ceded, granted, released and confirmed to the Commonwealth of Massachusetts, and with such armed force as they shall deem necessary for the more effectual holding such treaty or conference, and the Commonwealth of Massachusetts within six months after such treaties shall respectively be made, shall cause copies thereof to be deposited in the office of the secretary of the State of New York.

Tenthly. The Commonwealth of Massachusetts may grant the right of pre-emption of the whole or any part of the said lands and territories, to any person or persons who, by virtue of such grant shall have good right to extinguish by purchase the claims of the native Indians, provided, however, that no purchase from the native Indians by any such grantee or grantees shall be valid unless the same be made in the presence of, and approved by a superintendent, to be appointed for such purpose by the Commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the Commonwealth of Massachusetts.

Either party may read as a part of this case upon the hearing or argument of any motion for a new trial, or any appeal in this case, all or any part of any or all the acts, treaties, grants, or other documents or papers, shown in this case to have been read in evidence upon the trial.

The defendant then offered in evidence the record in the Erie county clerk's office, of the so-called "treaty," or conveyance from the plaintiff to Troup, Ogden and Rogers, dated August 31, 1826, and certificates annexed thereto, and recorded in Liber 10 of Deeds, at page 138, of the lands specified in that so-called "treaty," including those described in the complaint.

The plaintiff objected on the ground that it was null and void, and conveyed no title to said premises.

The court overruled the objections, and admitted the "treaty," or conveyance in evidence.

To which ruling the plaintiff duly excepted.

The said treaty, or conveyance of August 31, 1826, and the certificates annexed thereto, were thereupon read in evidence as follows:

"The Seneca nation of Indians to Robert Troup, T. L. Ogden, and B. W. Rogers.

21 "'*Treaty*' *of August* 31, 1826.

"At a treaty held under the authority of the United States, at Buffalo Creek, in the county of Erie, in the State of New York, between the sachems, chiefs and warriors of the Seneca nation of Indians, on behalf of said nation, and Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, Esqs., of the city of New York, in the presence of Oliver Forward, Esq., commissioner appointed by the United States for holding said treaty, and of Nathaniel Gorham, Esq., superintendent on behalf of the State of Massachusetts.

"Know all men by these presents, that the said sachems, chiefs and warriors, for and in consideration of the sum of forty-eight thousand two hundred and sixteen dollars, lawful money of the United States, to them in hand, paid by the said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers at or immediately before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, quitclaimed and confirmed, and by these presents do grant, bargain, sell, alien, release, quitclaim and confirm unto the said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, and their heirs and assigns, forever, all that tract or parcel of land commonly called and known by the name of the Caneadea reservation, situate, lying and being in the county of Allegany, in the State of New York, and containing sixteen square miles.

"Also all that other tract of land commonly called and known by the name of the Canagus reservation, situate, lying and being in the county of Livingston, in the said State of New York, and containing two square miles.

22 "Also all that other tract of land commonly called and known by the name of the Bigtree reservation, situate, lying and being in the said county of Livingston, and containing two square miles.

"Also all that other tract of land commonly called and known by the name of the Squawky Hill reservation, situate, lying and being in the said county of Livingston, and containing two square miles.

"Also all that other tract of land commonly called and known by the name of the Gardeau reservation, situate, lying and being in the county of Genesee, in the said State of New York, and containing two square miles, and being that part of the original Gardeau reservation which was excepted and reserved out of the sale of a part of the same to John Greig and Henry B. Gibson, at a treaty held at Moscow, in the county of Livingston, on the third day of September, one thousand eight hundred and twenty-three.

"Also all that other tract of land commonly called and known by

the name of the Buffalo Creek reservation, situate, lying and being in the said county of Erie, and containing by estimate eighty-three thousand five hundred and fifty-seven acres.

"Excepting nevertheless, and always reserving out of the said Buffalo Creek reservation, the following tract, piece or parcel thereof: that is to say, seventy-eight square miles, or forty-nine thousand nine hundred and twenty acres, bounded as follows, that is to say:

"Beginning on the north line of the said reservation at a point one mile and a half east of the Cayuga creek, running thence south one mile and a half; thence east parallel with the north line so far as that a line to be drawn from the termination thereof south
23 to a point one mile distant from the south line of the said reservation, and thence west parallel with the said south line to the west line of the reservation, and thence along the west and north lines of the same, to the place of beginning, will contain the said quantity of seventy-eight square miles, or forty-nine thousand nine hundred and twenty acres.

"Also all that other tract of land commonly called and known by the name of the Tonawanda reservation, situate, lying and being in the said counties of Genesee and Erie, and by estimation forty-six thousand two hundred and nine acres.

"Excepting nevertheless, and always reserving out of the said Tonawanda reservation, the following tract, piece or parcel thereof, that is to say: twelve thousand eight hundred acres, to be laid off in one body in such a manner as that one-half thereof shall be on one side of the Tonawanda creek, and the other half on the other side of the creek, and commencing at a point on the said creek, one mile and a half west of where it crosses the line of the said reservation, and the said creek being the center of the said twelve thousand eight hundred acres, until it strikes the northwest corner of the Tonawanda reservation.

"Also the following pieces or parcels of all that other tract of land commonly called and known by the name of the Cattaraugus reservation, situate, lying and being in the counties of Chautauqua, Cattaraugus and Erie, in the said State of New York; that is to say, one square mile or six hundred and forty acres, to be laid off in a square form, in the southwest corner of said reservation; six square miles, or three thousand eight hundred and forty acres in the north part of the said reservation, bounded on the north, and
on the east, by the north and east lines of the said reserva-
24 tion; on the west, by a line parallel to the east line, and six miles distant therefrom; and on the south, by a line parallel to the north line, and one mile distant therefrom; and one other square mile, or six hundred and forty acres, to be laid off in a square form, and bounded as follows; that is to say, on the east by the east line of said reservation; on the west by a line parallel thereto, and one mile distant therefrom; on the north by the south line of the piece last above described, and on the south by a line parallel thereto, and one mile distant therefrom.

"And which said several tracts, pieces or parcels of land so excepted and reserved, as aforesaid, out of the said Buffalo Creek and

Tonawanda reservations, are fully and clearly understood to remain the property of the said parties of the first part, and their nation, in as full and ample a manner as if these presents had not been executed.

"Together with all and singular the rights, privileges and appurtenances to the said thereby-granted premises belonging, or in anywise appertaining, and all the estate, right, title and interest, claim and demands whatsoever, of them, the said parties of the first part, and of their nation, of, in and to the said several tracts, pieces and parcels of land above described, except as is above excepted.

"To have and to hold, all and singular, the said granted premises, with the appurtenances unto the said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, their heirs and assigns in trust, for the use, benefit and behoof of themselves and such other person or persons as are respectively entitled to the right of pre-emption of the said several tracts, pieces or parcels of land, or any part or portion thereof.

25 "In testimony whereof, the parties to these presents, have hereunto, and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians, and one to remain with the said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, interchangeably set their hands and seals, at the council-house at Buffalo Creek, the thirty-first day of August, one thousand eight hundred and twenty-six."

(Then follow the names of the sachems, chiefs and warriors of the Seneca nation of Indians on behalf of the nation, being forty-six in number.)

ROBERT TROUP,
By his attorney, JOHN GREIG. [L. S.]
THOMAS L. OGDEN,
By his attorney, JOHN GREIG. [L. S.]
BENJAMIN W. ROGERS,
By his attorney, JOHN GREIG. [L. S.]

The words "and a half" twice interlined on the second page before executing.

Sealed and delivered in the presence of—
JASPER BARRISH, *Indian Agent.*
HORATIO JONES, *Interpreter.*
LEVI HUBBELL,
JACOB JIMESON, *Interpreters.*

Done at a treaty held with the sachems, chiefs and warriors of the Seneca nation of Indians at Buffalo Creek, in the county of Erie, and State of New York, on the thirty-first day of August, in the year of our Lord one thousand eight hundred and twenty-six, under the authority of the United States.

In testimony whereof, I have hereunto set my hand and seal, the day and year aforesaid, by virtue of a commission issued under the

seal of the Commonwealth of Massachusetts, bearing date the
26 thirty-first day of August, in the year of our Lord one thousand eight hundred and fifteen, pursuant to a resolution of the legislature of the said Commonwealth, passed the eleventh day of March in the year of our Lord one thousand seven hundred and ninety-one.

N. GORHAM,
Superintendent.

I have attended a treaty of the Seneca nation of Indians held at Buffalo Creek, in the county of Erie, and State of New York, on the thirty-first day of August, one thousand eight hundred and twenty-six, when the foregoing instrument was duly executed in my presence, by the sachems, chiefs and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned, and declared to be done to their universal satisfaction.

I do therefore certify and approve of the same.

OLIVER FORWARD,
Commissioner.

STATE OF NEW YORK, } *ss:*
Erie County, }

On the first day of September, in the year of our Lord one thousand eight hundred and twenty-six, before me, Ebenezer Walden, first judge of the court of common pleas of said county, and a counselor-at-law of the supreme court of said State, personally appeared Jasper Barrish, one of the subscribing witnesses to the foregoing instrument, to me known, who being duly sworn deposeth and saith, that he saw the several persons whose names are subscribed as grantors in the foregoing instrument, and as the sachems,
27 chiefs and warriors of the Seneca nation of Indians, severally executed the same as their voluntary act and deed for the uses and purposes therein mentioned; that he is acquainted with the said grantors and knows them to be the persons described in and who executed the said instrument, and that he, the said deponent, together with Horatio Jones, Levi Hubbell and Jacob Jimeson, severally subscribed their names as witnesses to the same.

I further certify that John Greig, to me known, also appeared before me, and acknowledged that he executed the said instrument as the attorney of Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, therein described, for the uses and purposes therein mentioned.

I further certify that Nathaniel Gorham, to me known, also appeared before me, and acknowledged that he executed the foregoing certificate subscribed by him as superintendent of the said treaty on behalf of the State of Massachusetts.

And I further certify that Oliver Forward, to me known, also appeared before me and acknowledged he executed the foregoing certificate subscribed by him as commissioner appointed by the United States, for holding the said treaty. All of which is satisfactory evi-

dence to me of the matters herein sworn to and acknowledged; and I allow the said deed to be recorded.

E. WALDEN."

"Recorded, examined and compared with the original, the ninth day of May, A. D. 1827, at half past two o'clock p. m.

"JACOB A. BARKER, *Clerk.*"

28 Defendant's counsel read in evidence the deed of partition made between the members of the Ogden Land Company, dated January 10, 1823, recorded on May 17, 1828, in Liber 11 of Deeds, at page 56, in the office of the clerk of the county of Erie, together with the diagrams or maps referred to therein, and annexed thereto, showing the division of the premises into lots.

It was admitted by the plaintiff that ever since the date of such partition deed, the members of the Ogden Land Company and their grantees, including the defendant, have occupied, sold and purchased the premises covered by said partition deed, according to such division into lots, and according to such lot lines, and that the boundary line between the lands of the Ogden Land Company and the lands of the Seneca nation of Indians, as determined by said so-called "treaty" of 1826, is the same boundary line described in said partition deed, and shown by and upon said maps and diagrams, and has continued to be ever since the making of said partition deed, and still is the actual boundary line between the lands occupied by said Ogden Land Company and its grantees, including the defendant, and the lands occupied by the Seneca nation of Indians.

The defendant also offered evidence to show that the defendant owned and held possession of the land described in the complaint, his title running back to Troup, Ogden and Rogers, under the aforesaid so-called "treaty" of August 31, 1826.

Said fact was admitted by plaintiff.

The defendant also read in evidence section 3 of chapter 34, of the laws of Congress of the United States of 1846, approved June 27, 1846, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and ful-
29 filling treaty stipulations with various Indian tribes for the year ending June 30, 1847," of which sec. 3 reads as follows:

"And be it further enacted, That the President of the United States be, and he is hereby, authorized to receive from the Ontario Bank of New York, any stock of the public debt of the United States, or moneys which the said bank may hold in trust for the said Senecas, whenever the said Indians, or other persons whose consent may be necessary, shall in proper form authorize the transfer; and to cause the stock to be cancelled, and the amount thereof, and of any moneys which he may receive, to be deposited in the Treasury, to the credit of said Indians, upon which amount interest shall thereafter be paid to them at the rate of five per cent. per annum, until

Congress may direct the principal in this and the preceding section to be paid to the Indians."

Defendant's counsel also read in evidence the treaty made between the Six Nations of Indians and the United States, dated November 11, 1794, at Canandaigua, N. Y., Timothy Pickering acting as commissioner on behalf of the United States. (American State Papers, vol. 1, Indian Affairs, p. 545; vol. 7, U. S. Statutes at Large, pp. 44 to 47.)

Article III of said treaty, after reciting the boundaries of the lands occupied by the Seneca nation of Indians, in which were included the lands covered by the so-called "treaty," or conveyance of 1826, reads as follows:

"Now, the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and
30 enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

Defendant's counsel read in evidence a "treaty," or conveyance between the Seneca nation of Indians and Thomas L. Ogden and Joseph Fellows, dated January 15, 1838, made at Buffalo Creek, in the State of New York, Ransom H. Gillett acting as commissioner on the part of the United States. (Vol. 7, U. S. Statutes at Large, pp. 557 to 559.)

Defendant's counsel also read in evidence the "treaty" between the United States and the Seneca nation of Indians, dated May 20, 1842. (Vol 7, U. S. Statutes at Large, pp. 586 to 591.)

Defendant's counsel also read in evidence article 1, title 2, chapter 4, of the third edition of the Revised Statutes of New York. Section 5 reads as follows:

"SEC. 5. No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of such action."

Defendant's counsel read in evidence a certified copy of the letter of authorization from James Barbour, Secretary of War of the United States, to Oliver Forward, as commissioner, dated the 23d day of May, 1826, as follows:

"DEPARTMENT OF WAR, 23*d May*, 1826.

"To the Hon. Oliver Forward, commissioner, &c.

"SIR: Frequent and recent applications having been made to the department, by the proprietors of the pre-emption right to
31 certain lands held by Indians in the State of New York, for the sanction of the Government to treat with them for the extinguishment of their right to the occupancy of the same, and it being deemed proper, that the United States, as the general protector of the Indian tribes, should be present, by their commissioner, at

the treaty which the proprietors propose to hold, during the ensuing summer, with said Indians for this object, you have been selected and appointed by the President for the performance of this duty.

"You are accordingly requested to correspond with the proprietors, and to attend the treaty at such time as may be fixed on, by them, for holding it, to see that all the proceedings are just and fair. Whatever may be done must be done with the free consent of the Indians. You will, however, exercise a sound discretion in the business, and if satisfied of the fairness of the propositions of the proprietors, will afford them such co-operation in effecting them as you may judge proper.

"The treaty, except your pay as a commissioner, will be held at the expense of the proprietors. Your compensation will be $8 per day for the time actually engaged, which will be ascertained and paid on your certificate.

"I have, &c., &c., JAMES BARBOUR."

It was admitted by counsel for the parties that said James Barbour was Secretary of War of the United States of America at the date of said writing and delivery of such letter.

The defendant also read in evidence a communication from John Quincy Adams, President of the United States, dated Febru-
32 ary 24th, 1827, addressed to the Senate of the United States, transmitting a copy of this so-called "treaty," or conveyance, and also papers accompanying it, including a report from Thomas L. McKenny, Sup't of Indian Affairs, to the Secretary of War, relating to the so called "treaty," or conveyance, a portion of which report is as follows:

"DEPARTMENT OF WAR,
"OFFICE OF INDIAN AFFAIRS, *February* 16, 1827.

"SIR: In regard to the treaty recently concluded between the Seneca tribe of Indians and the proprietors of the pre-emption right in the State of New York, I have the honor to state that, in pursuance of law and usage, an agent in the person of Oliver Forward was appointed to represent the United States under instructions from the Department of War, and to sanction, in behalf of the United States, the proceedings under said treaty. This trust has been executed.

"The intercourse law of 1802, which is a continuation of the act of 1790, with but slight variations (and none in regard to this subject), provides that no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto from any Indian or nation or tribe of Indians within the bounds of the United States, shall be of any validity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

"There follows a proviso which it is presumed is that under which the practice has been adopted of authorizing an agent to represent the United States at such treaties as the one recently made with the Senecas. It is in these words:

"SEC. 12. 'Provided, nevertheless, that it shall be lawful
33 for the agent or agents of any State who may be present at

any treaty held with the Indians under the authority of the United States in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such State, which shall be extinguished by the treaty.'

"In conclusion those treaties hitherto made under such circumstances, were submitted to the Senate except the treaty with the Senecas of the 3d of September, 1823, executed in presence of Charles Carroll, commissioner, on the part of the United States. It was esteemed to be a useless ceremony; the President approving it only.

"Respectfully submitted.

"THOMAS L. McKENNY.

"To the honorable the Secretary of War."

The defendant also read in evidence a certified copy of the proceedings of the United States Senate in respect to this so-called "treaty," which is as follows, to wit:

APPENDIX.

Proceedings of the Senate on the Treaty with the Seneca Indians.

WEDNESDAY, *December* 12, 1827.

On motion by Mr. Sanford,

Ordered, That the treaty with the Seneca Indians, transmitted to the Senate, the 26th day of February, 1827, be referred to
34 the Committee on Indian Affairs, and be printed in confidence for the use of the Senate.

FRIDAY, *February* 15, 1828.

Mr. Benton, from the Committee on Indian Affairs to which was referred, the 12th December, the treaty with the Seneca Indians, reported the same without amendment.

The Senate proceeded to consider, as in committee of the whole, the treaty with the Seneca tribe of Indians; and

On motion by Mr. Benton,

Ordered, That it lie on the table.

THURSDAY, *February* 28, 1828.

The Senate resumed, as in committee of the whole, the consideration of the treaty with the Seneca Indians, and no amendment having been made thereto, it was reported to the Senate.

Mr. Benton submitted the following resolution:

Resolved, two-thirds of the Senators present concurring, That the Senate advise and consent to the ratification of the treaty, made at the council-house, at Buffalo Creek, the 31st day of August, 1826, with the Seneca tribe of Indians, as soon as the President shall be satisfied that the purchase-money has been paid, agreeably to the provisions of the treaty.

FRIDAY, *February* 29, 1828.

The Senate resumed the consideration of the treaty with the Seneca Indians, together with the resolution submitted for the ratification of the same.

On the question to agree to the resolution,

Yeas, twenty.

Nays, twenty.

It was determined in the negative.

35 Those who voted in the affirmative are—

Mr. Barton,	Mr. Harrison,	Mr. Sanford,
Bateman,	Johnson, Ky.,	Seymour,
Bell,	Johnston, La.,	Thomas,
Benton,	Kane,	Webster,
Bouligny,	Noble,	White,
Chambers,	Robbins,	Willey.
Foot,	Ruggles,	

Those who voted in the negative are—

Mr. Berrien,	Mr. Hendricks,	Mr. Rowan,
Branch,	King,	Smith, S. C.,
Chandler,	McKinley,	Tazewell,
Cobb,	Macon,	Tyler,
Dickerson,	Marks,	Williams,
Ellis,	Parris,	Woodbury.
Hayne,	Ridgely,	

WEDNESDAY, *March* 26, 1828.

The following motions, submitted by Mr. Berrien, were considered:

Resolved, That by the refusal of the Senate to ratify the treaty with the Seneca Indians, it is not intended to express any disapprobation of the terms of the contract entered into by the individuals who are parties to that contract, but merely to disclaim any power over the subject-matter.

Resolved, That the injunction of secrecy be taken off from the proceedings of the Senate on the treaty with the Seneca Indians.

On motion by Mr. Webster,

Ordered, That the said motions lie on the table.

FRIDAY, *April* 4, 1828.

The Senate resumed the consideration of the motions, sub-
36 mitted the 26th of March, in relation to the treaty with the Seneca Indians, which, having been modified by the mover, were agreed to, as follows:

Resolved, That by the refusal of the Senate to ratify the treaty with the Seneca Indians, it is not intended to express any disapprobation of the terms of the contract entered into by the individuals who are parties to that contract, but merely to disclaim the necessity of an interference by the Senate with the subject-matter.

Resolved, That the injunction of secrecy be taken off from the proceedings of the Senate on the treaty with the Seneca Indians.

SENATE OF THE UNITED STATES,
OFFICE OF THE SECRETARY.

Under and by virtue of the provisions of section 895, of the Revised Statutes of the United States, I hereby certify that the foregoing is a true and correct copy of the proceedings of the Senate in executive session upon the treaty with the Seneca Indians, from which the injunction of secrecy has been removed, as the same appears of record in the Executive Journals of the Senate, and also in the appendix of the Legislative Journal of the first session of the Twentieth Congress, at pages 495, 496 and 497, and the whole thereof.

Given under my hand and seal of the United States Senate, at the city of Washington, in the District of Columbia, this 24th day of March, A. D. 1886.

Attest: ANSON G. McCOOK,
Secretary U. S. Senate.

37 The defendant also read in evidence a copy of the trust deed which was executed by the Ontario bank, in respect to the moneys deposited, which was as follows, to wit:

Trust Deed Given by the Ontario County Bank.

"To all — whom these presents shall come, we, the president, directors and company of the Ontario bank, send greeting:

"Whereas, Robert Troup, Thomas Ludlow Ogden and Benjamin Woolsey Rogers, have this day assigned and transferred to us forty-two thousand and five hundred dollars of stock in the public debt of the United States of America, bearing interest of six per centum per annum, being of the loan of 2d May, 1814, and also five hundred and fifty dollars of stock in the same debt and bearing the same interest, being of the loan of 1813:

"Now, know ye, that we have received and will hold and stand possessed of the said stock upon the following trusts, that is to say, until the transfer and assignment of the said stock as is hereinafter provided for, to pay the accruing interest thereof to the United States agent for the time being, of the Seneca nation of Indians, in execution of a contract made between them and the said Robert Troup, Thomas Ludlow Ogden and Benjamin Woolsey Rogers, bearing date the thirty-first day of August last, and whenever and as soon as the said nation shall in public council authorize a transfer of the said stock to the United States of America or to the President thereof, or otherwise; and the said Robert Troup, Thomas Ludlow Ogden and Benjamin Woolsey Rogers, shall in writing under their hands also authorize such transfer, that we will then transfer
38 the same according to such concurrent authorization. Provided, that if the said nation of Indians shall not authorize

such transfer, and the said Robert Troup, Thomas Ludlow Ogden and Benjamin Woolsey Rogers shall not concur in the same within two years from the date hereof, that we may discharge ourselves of the said trust by reassigning the said stock to the said Robert Troup, Thomas Ludlow Ogden and Benjamin Woolsey Rogers, to be held by them for the benefit of the said nation of Indians.

"In witness whereof, we have caused our seal to be affixed to two parts of these presents this twenty-first day of April, one thousand eight hundred and twenty-seven."

Attached to this paper is the seal of the bank with the signature of H. B. Gibson, cashier, and John Greig, president. These two names erased. Endorsed: "Paid 28th June, 1855."

The defendant also read in evidence a letter from the Commissioner of Indian Affairs to the Secretary of the Interior, dated June 21st, 1855, referring to the transfer of this money, with the endorsement thereon of the President of the United States, directing that that course be followed, which letter was as follows:

"DEPARTMENT OF THE INTERIOR,
"OFFICE INDIAN AFFAIRS, *June* 21, 1855.

"SIR: I have the honor to report that by the third section of the act making appropriations for the current and contingent expenses of the Indian Department, &c., approved June 27th, 1846, the President was authorized to receive from the Ontario bank, Canandaigua, New York, and to cause to be deposited in the Treasury of
39 the United States certain funds held in trust by the bank, for the Seneca Indians, under a declaration bearing date the 21st April, 1827.

"The amount so held is $43,050.00, on which, I am advised, the bank has paid the interest to the Indians to the 31st ultimo.

"In December last, this office was advised of the desire of the bank, in view of the expiration of its charter, to pay the amount of the principal, and be released of the trust, and it has lately given me notice of its readiness so to do, and that payment of interest will cease.

"I propose, with your approbation, to make arrangements, therefore, to receive the money, and deposit it in the Treasury, in pursuance of the act above cited. That this may be done, the bank requires that the original declaration of trust be endorsed by the President of the United States, and I enclose it herewith accordingly, that if he approves the course suggested, his signature may be obtained before his contemplated departure from the city.

"Very respectfully, your obedient servant,

"GEORGE W. MANYPENNY,
"*Commissioner.*"

Addressed to Hon. R. McClellan, Secretary of the Interior.

In this letter the deed of trust was inclosed.

The indorsement on the letter is "Department of the Interior, June 21, 1855. The Commissioner of Indian Affairs reports, in relation to the fund of $43,050.00 held by the Ontario bank for
40 the Seneca Indians, and encloses the original declaration of trust, with the suggestion that it be presented to the President for his endorsement thereon, &c."

Let the course recommended by the Commissioner of Indian Affairs be pursued.

(Signed) FRANKLIN PIERCE.

Washington, June 21, 1855.

Defendant's counsel also read in evidence a letter dated June 23, 1855, from George W. Manypenny, Commissioner of Indian Affairs, to Marcus H. Johnson, United States Indian Agent at Randolph, Cattaraugus county, N. Y., as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
"OFFICE INDIAN AFFAIRS, *June* 23, 1855.

"Johnson, Esq., Marcus H., U. S. agent, &c., Randolph, Cattaraugus Co., New York.

"SIR: Herewith I send you the original declaration of trust, by which the Ontario bank, Canandaigua, holds the sum of $43,050.00 for the Seneca Indians. I enclose also the report of this office to the Secretary of the Interior on the subject, dated the 21st inst., on which approval of the President to the receipt of the money from the bank, and its deposit in the Treasury of the United States, pursuant to the act of 29th June, 1846, is endorsed.

"The bank suggested that the signature of President Pierce be placed on the back of the declaration of trust, and it was in contemplation of this office that the suggestion be complied with,
41 but it would appear that the Secretary of the Interior deems it more proper that the President's signature be attached to an approval of the surrender of the trust fund, &c.

This will probably be more satisfactory to the bank than a mere endorsement on the instrument.

On the receipt of these papers, you will proceed, without delay, to Canandaigua, and receive of the bank the money ($43,050), surrendering to it, on such payment, the original declaration, and if required, the report, etc., endorsed by the President. You will then immediately convey the amount to Buffalo, and deposit it with the assistant treasurer at that point, to the credit of the Treasurer of the United States, taking the usual certificates; the original of which you will forthwith transmit to this office, where any further steps necessary to carry out the act of 1846 will be taken at once.

Very respectfully, your obedient servant,

GEORGE W. MANNYPENNY,
Commissioner.

It was admitted by counsel for the respective parties that about the year 1828, a boundary line was surveyed between the premises

purporting to be conveyed by the said treaty or conveyance of August 31, 1826, including those described in the complaint, and the remaining portion of the Cattaraugus reservation, not purporting to be conveyed thereby; that that line was plainly marked and blazed in the way common in that district of country at that time, in establishing boundary lines, and has ever since been maintained and recognized by the plaintiff, and by the successive grantees from the Ogden Land Company (so called), of the premises in-
42 cluded in such treaty or conveyance of August 31, 1826; that a portion of that boundary line, including that portion thereof alongside the premises described in the complaint, has been occupied with fences, which have been known and recognized as establishing or marking the line between the lands of the plaintiff, and the lands owned by the white people for more than twenty years before the beginning of this action.

The defendant here rested.

The plaintiff moved the court to direct a verdict in its favor.

The court denied the motion.

The defendant moved the court to direct a verdict in his favor.

The court granted the motion, and directed a verdict in favor of the defendant, to which direction the plaintiff duly excepted.

And because none of the foregoing facts appear of record, I have at the request of the plaintiff, caused this case and exceptions to be made, settled and signed this 19th day of March, 1888, and the same to be filed in the office of the clerk of Erie county.

HENRY A. CHILDS,
Justice of Supreme Court.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS, Appellant,
against
HARRISON B. CHRISTY, Respondent.

STATE OF NEW YORK, *County of Erie,* } ss:

James C. Strong, being duly sworn, says he is the attorney
43 for the plaintiff in the above-entitled action; that no opinion was written by the court that tried the case at special term.

JAMES C. STRONG.

Subscribed and sworn to before me this 12th day of March, 1888.

S. M. DOWZER,
Notary Public in and for Erie Co., N. Y.

STATE OF NEW YORK, *Erie County Clerk's Office,* } ss:

I, Charles A. Orr, clerk of said county, do hereby certify that I have compared the annexed copy of judgment-roll, case and exceptions, and notice of appeal, with originals entered and on file in this

office, and find the same to be true transcripts of and from the said originals and the whole of each thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Buffalo, N. Y., this 19th day of March, 1888.

[L. S.] C. A. ORR, *Clerk.*

At a general term of the supreme court of the State of New York, in and for the fifth judicial department, held at the court-house in the city of Rochester, Monroe county, on the 19th day of October, 1888.

Present: Hon. George Barker, presiding justice; Hon. Albert Haight, Hon. George B. Bradley, Hon. Charles C. Dwight, associate justices.

44 THE SENECA NATION OF INDIANS *against* HARRISON B. CHRISTY. } Order of Affirmance.

The appeal taken by the plaintiff from the judgment entered in the above-entitled action on the 5th day of July, 1887, in the office of the clerk of the county of Erie, whereby it is adjudged that the plaintiff take nothing by *his* complaint in this action, and that the defendant recover of said plaintiff the sum of $396.36, his costs of this action, and have execution therefor, having been regularly on the calendar of the March general term, 1888, of this court, and duly and regularly moved and heard, Mr. James C. Strong, attorney for appellant, appearing for the appellant, and Mr. Norris Morey, of the defendant's attorneys, appearing for respondent, and the cause having been there argued and submitted on the 13th day of April, 1888, and the said general term having, after due deliberation, this day handed down and filed its decision herein affirming the said judgment so appealed from in all respects, with costs, now, on motion of Sprague, Morey & Sprague, attorneys for the respondent, after hearing James C. Strong, attorney for the appellant, it is—

Ordered, that the said judgment entered in this action in the office of the clerk of the county of Erie, on the 5th day of July, 1887, be, and the same is hereby in all things affirmed, with the costs of said appeal to the respondent.

45 At a general term of the supreme court of the State of New York, in and for the fifth judicial department, held at the court-house, in the city of Rochester, Monroe county, on the 19th day of October, 1888.

Present: Hon. George Barker, presiding justice; Hon. Albert Haight, Hon. George B. Bradley, Hon. Charles C. Dwight, associate justices.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS *against* HARRISON B. CHRISTY. } Judgment of General Term.

The appeal taken by the plaintiff from the judgment entered in this action, in the office of the clerk of the county of Erie, on the 5th day of July, 1887, whereby it is adjudged that the plaintiff take nothing by *his* complaint herein, and that the defendant recover of said plaintiff the sum of $396.36, his costs of this action, and have execution therefor, having been regularly on the calendar of the March general term, 1888, of this court, and duly and regularly moved and heard, Mr. James C. Strong, attorney for appellant, appearing for said appellant, and Mr. Norris Morey, of defendant's attorneys, appearing for the respondent, and the cause having been there argued and submitted on the 13th day of April, 1888,
46 and the said general term having, after due deliberation, handed down and filed its decision herein affirming the said judgment so appealed from, in all respects, with costs, and an order of said general term having been duly made and entered thereon in accordance therewith, and the respondent's costs and disbursements of the said appeal having been duly taxed by the clerk of Erie county upon notice to the appellant's attorney at the sum of $92.33, now, on motion of Messrs. Sprague, Morey & Sprague, attorneys for the respondent, it is hereby adjudged that the judgment herein, so as aforesaid appealed from, be, and the same is hereby in all things affirmed, and that the respondent, Harrison B. Christy, recover of and against the appellant the sum of $92.33, his costs and disbursements of said appeal, and have execution therefor.

Judgment signed this 26th day of October, 1888.

C. A. ORR, *Clerk.*

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS, Appellants, *vs.* HARRISON B. CHRISTY, Respondent. } Notice of Appeal to Court of Appeals.

GENTLEMEN: Please take notice that the plaintiff, "The Seneca Nation of Indians," hereby appeals to the court of appeals
47 from the order and judgment of the general term of the supreme court, entered in the office of the clerk of the county of Erie on the 26th day of October, 1888, and from each and every part of said order and judgment.

Yours, etc.,

JAMES C. STRONG,
Attorney for Appellants.

To Charles A. Orr, Esq., clerk of the county of Erie, and to Messrs. Sprague, Morey, Sprague & Brownell, attorneys for respondent.

STATE OF NEW YORK, *Erie County Clerk's Office,* } ss.:

I, Charles A. Orr, clerk of said county, do hereby certify, that I have compared the annexed copy of the judgment-roll and notice of appeal, in the above-entitled action, and copy endorsements thereon, with the originals, entered and on file in this office, and find the same to be true transcripts of and from the said originals, and the whole of each thereof.

In witness whereof, I have hereto set my hand and affixed the seal of said county, at Buffalo, this twentieth day of June, 1889.

C. A. ORR, *Clerk.* [L. S.]

48 Supreme Court.

THE SENECA NATION OF INDIANS, Appellants,
vs.
HARRISON B. CHRISTY, Respondent.

General term, fifth department.

Argued March term, 1888.
Decided October 19, 1888.
Present: Bradley and Dwight, JJ.

Appeal from judgment entered on verdict at Erie circuit against the plaintiff.

James C. Strong, for appellant.
Norris Morey, for respondent.

BRADLEY, *J.:*

The action is ejectment, brought to recover the possession of a parcel of land formerly embraced within what was known as the Cattaraugus reservation, which from time immemorial was occupied by a portion of the Seneca nation or tribe of Indians. The land in question is included in that — of western New York which prior to 1786 was the subject of controversy between this State and Massachusetts. In that year the adjustment of the matter resulted in a treaty of cession entered into between those States, by which Massachusetts relinquished to the State of New York all claim to the government, sovereignty and jurisdiction over such territory, and the State of New York ceded, released and granted to Massachusetts the right of pre-emption of the soil from the native Indians, and
49 all other estate which the State of New York had in the land.

It was also provided by it that the Commonwealth of Massachusetts might from time to time, by persons authorized for that purpose, hold treaties and conferences with the native Indians relative to the property or right of soil of such lands, and might grant the right of pre-emption of the whole or any part of them to any person or persons who, by virtue of such grant, should take and have the right to extinguish by purchase the claims of such In-

dians, provided, however, that no purchase from them by any such grantees should be valid unless made in the presence of and approved by a superintendent appointed for such purpose by the Commonwealth of Massachusetts, and unless such purchase should by confirmed by that Commonwealth.

In May, 1791, the State of Massachusetts conveyed its title and interest in lands, embracing that in question, to Robert Morris, from whom by sundry mesne conveyances the same was conveyed to persons constituting and known as the Holland Land Company, in 1801, and afterwards and prior to August, 1826, the same title by mesne conveyances was conveyed to Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, commonly known as the Ogden Land Company.

On August 31, 1826, a treaty or conveyance was made and executed by the "sachems, chiefs and warriors of the Seneca nation of Indians on behalf of said nation," with and to Troup, Ogden and Rogers, in the presence of Oliver Forward, commissioner appointed by the United States, and of Nathaniel Gorham, superintendent on behalf of the State of Massachusetts, by the terms of which
50 the sachems, chiefs and warriors for and in consideration of forty-eight thousand two hundred and sixteen dollars to them in hand paid by Troup, Ogden and Rogers, the receipt whereof was acknowledged, "granted, bargained, sold, aliened, released, quitclaimed and confirmed to them the same lands particularly described as those embraced in the prior conveyance to the grantees. Immediately after such treaty was made the Indians surrendered and abandoned the possession of the land to such grantees, who soon thereafter and before 1832, entered into the full and exclusive possession of it, and the possession of the land has ever since been held by them and their successive grantees of the parcels into which it has been divided, who have paid taxes assessed upon it. The title under which the defendant claims was derived from the grantees of the treaty of 1826, and he and the various persons through whom he claims (like those who have purchased other portions of the tract) purchased in good faith and for valuable considerations, and ever since about the year 1826 have occupied the land and made valuable improvements upon it in reliance upon such title.

It is clear that Troup and his associates had title to the lands, subject to right of the Indians, and had the right of pre-emption from them. But it is contended that the treaty of 1826, made with the Indians, was not effectual to convey their right or interest in the land, because the approval of it by the Senate of the United States was essential to that result. This treaty of August, 1826, was transmitted to the Senate in 1827, and in the year following a resolution for its ratification was negatived. And soon after this the Senate adopted a resolution to the effect, that by the refusal to ratify the treaty, it was not intended to express any disap-
51 probation of the contract, but merely to disclaim the necessity of interference by the Senate with the subject-matter.

The condition of pupilage or wardship of the Indians in this country has been recognized and observed by Government. They

have been deemed the rightful occupants of the soil, and as having a just and legal claim to the possession and use of it until this right has in some manner been extinguished.

This was the governmental theory before as well as since the American revolution, although such humane considerations may not at all times have characterized the means employed in obtaining or taking from those natives the possession of lands occupied by them. And with a view to the protection of their rights in that respect, the means by which the release or extinguishment of such interest might be produced has constantly been under the supervision of the sovereign or governmental power within which the lands are situated and regulated by rules or laws emanating from it.

The treaty of 1783 with England had the effect to vest in the people of the States respectively the fee, which before was in the Crown, of the lands within their limits, subject to the right then existing of the Indians to occupy the lands in their possession. And those States respectively then possessed the power to supervise and regulate the manner and method by which their right of occupancy might be released or extinguished.

Johnson *vs.* McIntosh, 8 Wheaton, 543.
Mitchell *vs.* United States, 9 Peters, 711.

Inasmuch as the General Government never had title to the lands within the thirteen original States, it is contended that it acquired no power to extinguish the Indian title within them, but that
52 such power was exclusively under the control of the States in which was vested the ultimate fee. And reference is made to the remark of Mr. Justice Baldwin, in Mitchell *vs.* United States (*supra*, p. 748), that "it was a universal rule that purchases made at Indian treaties in the presence and with the approbation of the officer under whose direction they were held by the authority of the Crown gave a valid title to the lands; it prevailed under the laws of the States after the Revolution, and yet continues in those where the right to the ultimate fee is owned by the States or their grantees."

This power undoubtedly was exclusively in those States respectively prior to the adoption by them of the Constitution of the United States, before which time the treaty between the States of Massachusetts and New York was made, and after the adoption of such Constitution that treaty was duly ratified by the United States. If the means provided by that treaty for the extinguishment by purchase of the Indian title were adequately operative at the time the treaty of 1826 was made, the latter would seem to have been apparently effectual to produce such result, without the aid of any ratification of the Senate of the United States, as the provision of the former treaty in that respect seems to have been observed in the making of the latter. At the time of the adoption of the Federal Constitution the ultimate fee of this land was in the Commonwealth of Massachusetts. And by the adoption of such Constitution it surrendered to the Congress of the General Government the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes" (Const., art. 1, sec. 8), and to the President

the power by and with the advice and consent of the Senate
53 to make treaties (*id.*, art. 2, sec. 2), which should be the supreme law of the land (*id.*, art. 6).

Since then the Indians in the original as well as in the other States and Territories have been treated as the wards of the General Government, and the power of Congress over the subject of their rights, and for the protection of them in their ancient possessions is recognized. Their rights in that respect are deemed guaranteed to them by the Federal Government, and the power of the States to impair, or by legislation to permit in any manner the extinguishment of the Indian title in aid of the owners of the right of pre-emption is denied to them. The New York Indians, 5 Wall., 761.

The remark before mentioned of the learned justice, in Mitchell *vs.* United States, was designed as historical rather than judicial as applied to that case, and it may not be treated or adopted as the declaration of a legal rule in its application to the power of the States, there referred to, after the adoption of the Constitution. But inasmuch as the treaty between Massachusetts and New York was duly ratified by the United States, its provisions in that respect prescribed the manner in which it might effectually be done; and it was not impaired by the treaty of 1794, made between the United States and the Six Nations (of which the Seneca nation was one), which, after reciting the boundaries of the lands occupied by the Seneca nation in which were embraced those covered by the treaty or conveyance of 1826, declared that the United States acknowledged the land within such boundaries to be the property of the Seneca nation; that the United States would never claim it or disturb the Seneca nation, nor any of the Six Nations or any of
54 their Indian friends residing thereon, and united with them in the free use and enjoyment thereof, "but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." This right of pre-emption was in Troup and his associates in the treaty of 1826, at the time it was made, and they alone had the right to purchase from the Indians the land embraced in it. We therefore think that such last-mentioned treaty was effectual as a sale and purchase, unless to render it such something more was required by the act of Congress of March 30, 1802, which provided that no purchase of any title or claim to lands from any Indian, or nation or tribe of Indians within the bounds of the United States, shall be of any validity unless made by treaty or convention entered into pursuant to the Constitution, and that it should be a misdemeanor in any person not employed under the authority of the United States to negotiate with any such Indian nation or tribe of Indians for the title or purchase of any lands held or claimed by them. "Provided, nevertheless, that it shall be lawful for the agent or agents of any State who may be present at any treaty held with the Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such

State, which shall be extinguished by the treaty." 2 R. S. at Large, 143; Brightly's Digest, 433. The negotiation and making with the Indians of the treaty of August, 1826, came within the provisions of this proviso of that act, which seem to have been observed, as the treaty was attended by and had the approbation of a commis-
55 sioner of the United States appointed for the purpose, and pursuant to the laws of Massachusetts by a superintendent appointed by that Commonwealth. While the treaty was properly made with the Indians, the provision of the statute that for the purposes in view it be entered into, pursuant to the Constitution, we think, was not modified or dispensed with by the proviso in the cases there referred to. While in the States the negotiation and treaty might be had and made with the Indians in the manner mentioned, the constitutional requirement was made applicable for the consummation of all treaties of that character. This construction is apparently within the purpose of the statute, and in harmony with the protecting policy of the General Government in that respect. It seems also to be wisely so provided as a safeguard against possible abuse, prejudice and wrong, to which those people might otherwise be subjected, or suffer by the extinguishment which they may have been induced to make or permit of their interest in lands occupied by them. These views lead to the conclusion that ratification by the Senate was essential to the treaty of 1826. And, therefore, the defense would fail if it depended solely upon such treaty and its effect as such. It may be that the Senate had a different view of the construction of the statue of 1802, but the reasons for the last resolution adopted by the Senators do not sufficiently appear to furnish any aid in the consideration of the question.

It appears that at the time the treaty was made, the Indians were advised that their grantees had the right of pre-emption from them, and that they immediately surrendered and abandoned the possession to them of the lands described in it, and since then until about the time of the commencement of this action, during the
56 period of about sixty years, they in no manner asserted or made any claim to the land or the possession of it.

But in view of the known habits of Indians they may not be supposed to represent their occupation or possession by improvements or enclosures of all or great portions of their lands. They may use them to considerable extent for the purposes of roaming and hunting, more or less frequently, as they please. And what might appear to be a cessation of actual occupation and use might not necessarily be such an abandonment as would extinguish their right of occupancy, and support that of those having the fee of the lands. And ordinarily that question might be dependent upon a judicial determination in a proceeding or action having in its purpose and effect that of the common-law writ of office (3 Bl. Com., 257–'8).

But in this case the abondonment and surrender were not only practically made, but have been characterized by such circumstances, and by such recognition, not only by the Indians, but by the Government, in such manner as to determine the situation and in legal effect to sever the prior relation of the Indians to the lands from

them. The quantity of land covered by the treaty of conveyance was large.

Those lands were surveyed and their boundaries plainly marked. Of the purchase-money, $43,050, represented by the stock in the public debt of the United States for that amount, bearing interest at the rate of six per cent. per annum, were deposited by the grantees in the Ontario bank at Canandaigua, in trust for the Indians, upon which by it the interest was paid annually to, and received by the Seneca nation of Indians, until in the year 1856, when it was transferred to the Treasury of the United States, pursuant to
57 an act of Congress of 1846, authorizing the President to receive the stock of the public debt or moneys held by the bank in trust for the Senecas, whenever those Indians, or other persons whose consent might be necessary, should in proper form authorize the transfer, and to cause the stock to be cancelled, and the amount of it and of any moneys which he might so receive, to be deposited in the Treasury to the credit of those Indians, upon which amount interest at the rate of five per cent. per annum should be paid to them, until Congress should direct the principal to be paid to the Indians. Such interest has, since then, pursuant to that act, been paid to and received by the Seneca nation. This provision made by the action of Congress for the care of this fund and for the payment of interest upon it, and the observance of the statutory authority and direction following it, may be assumed to have been made and had with knowledge of the treaty of sale and purchase by which the fund was produced; and they constitute something of a recognition of the treaty and of the apparent effect given to it. It also appears that treaties were made between the Seneca Indians and the United States in the years 1838 and 1842, in which the estimated area of the Cattaraugus reservation was made, and such estimate did not include in it any of the lands covered by the treaty of August, 1826.

While it may be said that ratification of what is unlawful may not be established by uncertain implication (Cox *vs.* Mayor, 103 N. Y., 519), that proposition is not applicable to the question presented here. The treaty of 1826 apparently was not unlawful. It appears to have been lawfully conducted and made. And the only thing wanting to make it effectual was the approval by the Senate, which seems to have been required by the act of 1802, before men-
58 tioned. The act of Congress providing for the governmental protection of the fund, derived from the treaty of sale, for the benefit of the Indians, which was consummated, goes far toward legislative adoption of the sale and purchase which the treaty purported to make, and we think it is entitled to and has that effect.

But however that may be, in view of the conceded fact that, upon making the treaty, the Indians surrendered and abandoned the possession of the lands to the owners of the right of pre-emption, and in view of the situation following it, and the facts before referred to bearing upon the relations assumed and recognized to exist as well by Government as by the parties to and represented in

the treaty, the conclusion would seem to be permitted that there was an effectual abandonment of the lands embraced in it by the Indians, and that the purchase-money agreed to be and paid was taken, and it or the most of it held by the Government in lieu of such lands, in trust for the Indians. We do not hold that the Indians would by voluntary surrender merely, extinguish their title and thereby entitle those having the right of pre-emption from them, to appropriate the possession of such lands. That would have the effect to defeat the purpose and policy of Government, but when by the legislative power of the Government such voluntary action is recognized and treated as consistent with the interest of the Indians, and effectual, no reason now appears why it may not be deemed supported. The abandonment in question here was the result of a sale for a consideration paid, and has been so treated by Congress and the constituted authorities of the United States for at least nearly forty years before the time of the commencement of
59 this action, and in the meantime the lands, divided into farms, have been the subject of sales, conveyances, cultivation and improvement upon the faith of the title so conveyed and taken, assured by an exclusive possession of sixty years, and founded, so far as related to the Indian title, upon the treaty of conveyance before mentioned, and on record in the county where the land is situated. The title of the Indians was possessory, and embraced the right of occupancy only. And when abandoned by them the possession attached itself to the fee of the lands. Johnson *vs.* McIntosh, 8 Wheat., 543; United States *vs.* Cook, 19 Wall., 591; Beecher *vs.* Wetherby, 95 U. S., 517. At the time of such abandonment the fee was in the persons composing the Ogden Land Company, under whom through mesne conveyances the defendant is in possession, claiming title to the land in question.

The suggestion that the entire amount of the purchase-money was not paid, and that such fact is in the way of supporting the claim to the Indian title, is not sustained. We are not called upon to consider the effect of default in payment of any portion of the purchase-money. The treaty recites the payment of it, and as no such question seems ever before to have been raised, or full payment questioned, either by Government or the Indians, it must at this late day be assumed, until the contrary is quite clearly made to appear, that the contract in that respect was performed. The plaintiff, not being a corporation and having no such corporate name, could not at common law maintain an action. Strong *vs.* Waterman, 11 Paige, 607. This right, however, was, more than forty years ago, conferred by statute, which amongst other things provides, that the Seneca
60 nation of Indians may maintain any action of ejectment to recover the possession of any part of the Allegany and Cattaraugus reservations unlawfully withheld from them. Laws of 1845, ch. 150, section 1; 4 Edm., 375.

The further question presented, and by counsel discussed, is whether the statute of limitations is applicable, and a bar to the plaintiff's right of action. In the view taken the determination of

that question is not essential. And for that reason it has no consideration on this review.

The judgment should be affirmed.
Dwight, J., concurs.

61 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 14th day of April, in the year of our Lord one thousand eight hundred and ninety-one, before the judges of said court.
Witness the Hon. William C. Ruger, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur, April 15th, 1891.

THE SENECA NATION OF INDIANS, Appellant,
ag'st
HARRISON B. CHRISTY, Respondent.

Be it remembered that on the 21st day of June, in the year of our Lord one thousand eight hundred and eighty-nine, The Seneca Nation of Indians, the appellant in this action, came here
62 into the court of appeals by James C. Strong, Esq., its attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Harrison B. Christy, the respondent in said action, afterwards appeared in said court of appeals by Sprague, Morey, Sprague and Brownell, Esqrs., his attorneys; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. James C. Strong, of counsel for the appellant, and by Mr. Norris Morey, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court; and it was also further ordered that the record aforesaid and
63 the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law. Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, etc.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *April 15th*, 1891.

I hereby certify that the preceding record contains a cor-
64 rect transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] GORHAM PARKS, *Clerk.*

[Endorsed:] The Seneca Nation of Indians, appellant, *vs.* Harrison B. Christy, respondent. Filed in Erie county clerk's office, N. Y., April 17, 1891, at 3.20 p. m.

STATE OF NEW YORK, }
Erie County Clerk's Office, } *ss:*

I, Charles N. Brayton, clerk of said county, do hereby certify that I have compared the annexed copy remittiture and copy endorsements thereon with an original thereof and its endorsements entered and on file in this office and find the same to be true transcripts of and from the said originals and the whole of each thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 3rd day of October, 1892.

[Seal of Clerk's Office for the County of Erie, N. Y.]

C. N. BRAYTON, *Clerk.*

65 1.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS, Appellants, } Notice of Appeal
vs. } to Court of Ap-
HARRISON B. CHRISTY, Respondent. } peal-.

GENTLEMEN: Please take notice that the plaintiff, The Seneca Nation of Indians, hereby appeals to the court of appeals from the order and judgment of the general term of the supreme court entered in the office of the clerk of the county of Erie on the 26th day of October, 1888, and from each and every part of said order and judgment.

Yours, &c., JAMES C. STRONG,
Att'y for Appellants.

To Charles A. Orr, Esq., clerk of the county of Erie, and to Messrs. Sprague, Morey, Sprague and Brownell, att'ys for respondent.

66 [Endorsed:] Supreme court, Erie county. Seneca Nation of Indians, appellant, ag'st Harrison B. Christy, respondent. Notice of appeal to the court of appeals. James C. Strong, att'y for appellant, No. 41 East Seneca St., Buffalo, N. Y. Erie county clerk's office, N. Y. Filed April 6th, 1889.

67 At a special term of the supreme court of the State of New York held in and for the county of Erie, at the city and county hall, in the city of Buffalo, N. Y., on the 17th day of April, 1891.

Present: Hon. Loran L. Lewis, justice.

Supreme Court, Erie County.

THE SENECA NATIONS OF INDIANS
against
HARRISON B. CHRISTY.

The plaintiff herein having appealed to the court of appeals from the judgment heretofore and on the 26th day of October, 1888, entered in the above-entitled action affirming the judgment entered in said action on the 5th day of July, 1887, and said court of appeal- having heard the said appeal and having ordered and adjudged that said judgment so appealed from be affirmed and judgment rendered for the defendant, with costs:

Now, upon reading and filing the remittitor in the said court of appeals and upon motion of Sprague, Morey, Sprague and
68 Brownell, attorneys for defendant, it is ordered that the said judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the aforesaid judgment entered herein on the 26th day of October, 1888, be, and the same is hereby, affirmed, and that judgment of this court be entered herein affirming said judgment, with costs of said appeal against the plaintiff, to be taxed.

[Endorsed:] Supreme court, Erie county. The Seneca Nation of Indians, plaintiff, against Harrison B. Christy, defendant. Order. Sprague, Morey, Sprague and Brownell, attorneys for def't; office and P. O. address, 377 Main street, Buffalo, N. Y. Erie county clerk's office. Filed April 17, 1891, @ 3.20 p. m.

69 2.

Supreme Court.

THE SENECA NATION OF INDIANS, Plaintiff and Appellant,
ag'st
HARRISON B. CHRISTY, Defendant.

An appeal having been heretofore and on the 8th day of April, 1891, taken herein to the court of appeals from the judgment of the general term of this court, entered in the Erie county clerk's office

on the 26th day of October, 1888, and said appeal coming on to be heard on the calendar of said court of appeals and having been regularly reached and argued and submitted by James C. Strong, Esq., of counsel for appellant, in support of said appeal, and Norris Morey, Esq., of counsel for said respondent, in opposition thereto, and due deliberation having been had thereon, now, on motion of Messrs. Sprague, Morey, Sprague and Brownell, attorneys for respondent, it is adjudged and decreed that the judgment of the general term of this court be, and the same hereby is, in all respects affirmed,
70 and that the respondent, Harrison B. Christy, recover of and against the appellant, The Seneca Nation of Indians, $121.92, his costs and disbursements on said appeal.

Judgment signed this 24th day of April, 1891.

CHAS. H. AVERY, *Dep. Clerk.*

[Endorsed:] Supreme court, Erie county. Seneca Nation of Indians, plaintiffs and app'l't, against Harrison B. Christy, defendants and resp'd't. Judgment. Sprague, Morey, Sprague and Brownell, attorneys for def't and re'p't; office and P. O. address, 377 Main street, Buffalo, N. Y. Erie county clerk's office, N. Y. Filed Apr. 24, 1891, @ 3.50 p. m.

STATE OF NEW YORK, }
Erie County Clerk's Office, } ss:

I, Charles N. Brayton, clerk of said county, do hereby certify that I have compared the annexed copy of all the papers on file in this office from the court of appeals in the above-entitled action and of the judgment entered therein and copy endersements thereon with an original thereof and its endorsements entered and on file in this office and find the same to be true transcripts of and from the said originals and the whole of each thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 18th day of Oct., 1892.

[Seal of Clerk's Office for the County of Erie, N. Y.]

C. N. BRAYTON, *Clerk.*

71 THE SENECA NATION OF INDIANS }
vs.
HARRISON B. CHRISTY. }

UNITED STATES OF AMERICA, }
State of New York, } ss:

To the Honorable Samuel Blatchford, associate justice of the Supreme Court of the United States:

The petition of "the Seneca Nation of Indians" respectfully shows that on the seventeenth day of April, A. D. 1891, the supreme court of the State of New York, sitting at Buffalo, New York, rendered a final judgment against your petitioner in a certain cause wherein

your petitioner was plaintiff and Harrison B. Christy was defendant, whereby the judgment of the court of appeals of the State of New York was made the judgment of said supreme court, thereby affirming the judgment and order of the general term of said supreme court entered on the 26th day of October, A. D. 1888, affirming the judgment of the special term of said supreme court in said cause entered on the fifth day of July, A. D. 1887, whereby a verdict for the defendant of no cause of action was rendered; all of which
72 will appear by reference to the record and proceedings in said cause, and that said court is the highest court in said State in which a decision could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under section seven hundred and nine of the Revised Statutes of the United States, because there was drawn in question in said cause the title, right, privilege, and immunity of the plaintiff in error under the Constitution of the United States and under the act of Congress of March 30th, A. D. 1802, and the decision was against the title, right, privilege, and immunity specially set up and claimed by the plaintiff in error under said Constitution and statute, the plaintiff in error, your petitioner, claiming that, being a nation of Indians, under the said Constitution and statute no purchase of land made from it was valid unless made in accordance with the provisions of said Constitution and statute, and that the treaty of August 31st, A. D. 1826, was not so made, the same never having been ratified by the Senate of the United States or proclaimed by the President, as required by said Constitution and statute.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation; and your petitioner will ever pray, etc.

WALLACE HALFTOWN,
President of the Seneca Nation of Indians.

73 STATE OF NEW YORK, }
County of Erie, } ss:

Wallace Halftown, being first duly sworn, deposes and says that he is the president of The Seneca Nation of Indians, the petitioner in the above petition; that he resides at Carrollton, Cattaraugus county, New York; that he has heard read the foregoing petition and knows the contents thereof, and that the same is true to the knowledge of deponent except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WALLACE HALFTOWN.

Subscribed and sworn to before me this 7th day of October, A. D. 1892.

[Seal C. Louis Fritz, Notary Public, Erie County, N. Y.]

C. LOUIS FRITZ,
Notary Public in and for Erie County, New York.

74 [Endorsed:] Supreme Court of the United States. The Seneca Nation of Indians *vs.* Harrison B. Christy. Petition for writ of error.

75 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New York, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Seneca Nation of Indians, plaintiff, and Harrison B. Christy, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or

76 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Seneca Nation of Indians, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

October 10, 1892.

77 [Endorsed:] Supreme Court of the United States. The Seneca Nation of Indians, pl'ff in error, *vs.* Harrison B. Christy, def't in error. Writ of error. 8–157. Clerk's office, Erie county, N. Y. Filed Oct. 18, 1892.

78 UNITED STATES OF AMERICA, *ss:*

To Harrison B. Christy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, wherein The Seneca Nation of Indians is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, associate justice of the Supreme Court of the United States, this tenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

79 [Endorsed:] Original. Supreme Court of the United States. The Seneca Nation of Indians, pl'ff in error, *vs.* Harrison B. Christy, def't in error. Citation. Sheriff: Return this to Henry N. Brendel, Esq., No. 41 East Seneca St., Buffalo, N. Y. Held.

On this twenty-sixth day of October, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared Julius M. Schwert before me, the subscriber, Oliver G. Steele, a notary public in and for Erie county, New York, and makes oath that he delivered a true copy of the within citation to Harrison B. Christy, the defendant in error named in said citation, at his residence, in the town of Brant, county of Erie and State of New York.

JULIUS M. SCHWERT.

Sworn to and subscribed the 26th day of October, A. D. 1892.

[Seal of Oliver G. Steele, Notary Public, Erie County, N. Y.]

OLIVER G. STEELE,
Notary Public.

Service of a copy of the within and of the writ of error mentioned herein hereby admitted this 18th day of October, 1892.

80 Know all men by these presents that we, the Seneca nation of Indians, of the State of New York, as principal, and James C. Strong and Henry W. Brendel, of Buffalo, New York, as sureties, are held and firmly bound unto Harrison B. Christy, his executors, or administrators, in the full and just sum of one thousand dollars,

to be paid to the said Harrison B. Christy, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of the supreme court held at Buffalo, in the State of New York, in a suit depending in said court between The Seneca Nation of Indians, in said State, and Harrison B. Christy, of Erie county, in said State, a judgment was rendered against the said The Seneca Nation of Indians, and the said Seneca Nation of Indians having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Harrison B. Christy, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said The Seneca Nation of Indians shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WALLACE HALFTOWN. [SEAL.]
JAMES C. STRONG. [SEAL.]
HENRY W. BRENDEL. [SEAL.]

Sealed and delivered in presence of—
N. C. HOAG.
EDWARD C. HANDWERK.
C. LOUIS FRITZ.

Approved by—
——— ———.

81 [Endorsed:] Supreme Court of the United States. The Seneca Nation of Indians *vs.* Harrison B. Christy. Bond, $1,000.00. (Copy.)

STATE OF NEW YORK, } ss:
County of Erie, }

James C. Strong & Henry W. Brendel, the sureties named in the within bond, being severally sworn, depose and say. The said James C. Strong for himself says that he is worth the sum of two thousand dollars over and above all his just debts and liabilities, and the said Henry W. Brendel for himself saith that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

JAMES C. STRONG.
HENRY W. BRENDEL.

Subscribed & sworn to before me this 15th day of October, 1892.
[L. S.] C. LOUIS FRITZ,
Notary Public in & for Erie Co., N. Y.

STATE OF NEW YORK, }
County of Erie, } ss:

On this fifteenth day of October, 1892, personally appeared before me, Wallace Halftown, James C. Strong, & Henry W. Brendel, personally known to me to be the persons who executed the within bond, and severally acknowledged that they executed the same, and the said Wallace Halftown duly acknowledged that he executed the same for and in behalf of the Seneca nation of Indians as the president of said nation.

[L. S.]

C. LOUIS FRITZ,
Notary Public in & for Erie Co., N. Y.

The foregoing bond is approved.
Oct. 24, 1892.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

STATE OF NEW YORK, }
Erie County Clerk's Office, } ss:

I, Charles N. Brayton, clerk of said county, do hereby certify that I have compared the annexed copy bond and copy endorsements thereon with an original thereof and its endorsements entered and on file in this office and find the same to be true transcripts of and from the said originals and the whole of each thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 27th day of October, 1892.

[Seal of Clerk's Office for the County of Erie, N. Y.]

C. N. BRAYTON, *Clerk.*

82 843. 15182.

Supreme Court.

THE SENECA NATION OF INDIANS }
ag'st }
HARRISON B. CHRISTY. }

It is hereby stipulated that a copy of the opinion of the court of appeals handed down and filed upon the decision rendered by the court of appeals affirming the judgment in this action may be filed with the record herein, with this stipulation, in the office of the county clerk of Erie county, and that a copy of such opinion and of this stipulation may be certified as a part of the return to the writ of error taken by the plaintiff herein to the Supreme Court of the United States, and the same shall thereupon become a part of such return.

Dated Sept. 7, 1893.

A. P. WHITEHEAD, *Att'y for Pl'ffs.*
SPRAGUE, MOREY, SPRAGUE & BROWNELL, *Att'ys for Def't.*
E. C. SPRAGUE,
Attorney for Defendant.

83 STATE OF NEW YORK, } ss:
Court of Appeals, }

I, Gorham Parks, clerk of the court of appeals of the State of New York, hereby certify that the annexed is a correct copy of the opinion of said court and of the whole thereof rendered upon the decision of the appeal taken by the plaintiff therein from the judgment of the court below in the action of The Seneca Nation of Indians against Harrison B. Christy, and which opinion was handed down upon the decision of said appeal on April 14, 1891, and that the correct and official report and record of said opinion appears in vol. 126 of the reports of said court, entitled "126 New York Reports," pages 127 to 147.

In witness whereof I have hereunto affixed my hand and the official seal of said court this 24th day of October, 1893.

[Seal of Court of Appeals, State of New York.]

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

84 Court of Appeals.

SENECA NATION OF INDIANS }
ag'st
HARRISON B. CHRISTY. }

ANDREWS, *J.*:

This is an action of ejectment brought to recover one hundred acres of land in the county of Erie.

The general facts are undisputed. The land in question is a part of a tract of more than 87,000 acres, or 135 square miles, of land situate in Erie and other counties in the western part of the State, which prior to August 31, 1826, and for a period extending back to about the middle of the seventeenth century, had been in the occupation of the Seneca nation of Indians, claiming dominion by conquest from other aboriginal tribes.

On the day mentioned (August 31, 1826), at a public council of the Seneca nation held at Buffalo Creek, in the county of Erie, a deed was executed by the Indians to Robert Troup, Thomas L. Ogden, and Benjamin W. Rogers (known as the Ogden Land Company) of the 87,000 acres of land to which reference has been made, situated in Erie, Cattaraugus, Allegany, Livingston, Genesee, and Chautauqua counties, in this State. The deed contains a recital that it was executed "at a treaty held under the authority of the United States, at Buffalo Creek, in the county of Erie, in the State of New York, between the sachems, chiefs, and warriors of the Seneca nation of Indians, on behalf of said nation, and Robert Troup, Thomas L. Ogden, and Benjamin W. Rogers, Esq., of the city of
85 New York, in the presence of Oliver Forward, Esq., commissioner appointed by the United States for holding said treaty, and of Nathaniel Gorham, Esq., superintendent on behalf of the State of Massachusetts." It purports, in consideration of the sum of

$48,216, acknowledged in the deed to have been in hand paid to the sachems, chiefs, and warriors of the Seneca nation by the grantees, to grant to the purchasers all the right, title, and interest of the Seneca nation in and to the lands described, and was executed under the hands and seals of the sachems, chiefs, and warriors (forty-six in number) of the Seneca nation and of the several grantees on the deed, and is witnessed by Joseph Parish, Indian agent, and three other persons, described as interpreters. It was certified and approved by the superintendent appointed on behalf of the State of Massachusetts and by Oliver Forward, the commissioner of the United States. It is stated in the certificate of the United States commissioner that the deed was executed in his presence by the sachems, chiefs, and warriors of the Seneca nation, and was fully understood by them, who declared that it was "done to their universal satisfaction." The deed was proved by one of the subscribing witnesses, was afterwards confirmed by the legislature of Massachusetts, and in 1827 was duly recorded in the several counties in this State in which the lands were situated. In 1827 the sum of $43,050 of the consideration of the deed was deposited by the grantees in the Ontario Bank of Canandaigua in trust for the Seneca nation, where it remained from that time until 1855, when it
86 was paid over by the bank into the United States Treasury, where it still remains. Meanwhile, from 1827 to the time of the commencement of this suit, a period of nearly sixty years, the interest on this fund has been annually paid to the Seneca nation, first by the bank, and afterwards by the United States. It does not appear how or when the remainder of the consideration mentioned in the deed was paid, or whether it was paid at all, except as may be inferred from the acknowledgment of payment of the consideration in full contained in the deed.

The conveyance or treaty of August 31, 1826, was never ratified by the Senate of the United States or proclaimed by the President. The extent of the participation of the United States in the transaction may be briefly stated. By the ordinance of August, 1786, the Department of Indian Affairs was placed under the control of the War Department. May 23, 1826, the then Secretary of War of the United States, in a letter of that date, directed to "Oliver Forward, commissioner," after stating that application had been made to the department "by the proprietors of the pre-emption right to certain lands held by Indians in the State of New York for the sanction of the Government to treat with them for the extinguishment of their right to the occupancy of the same, and it being deemed proper that the United States, as the general protector of the Indian tribes, should be present by their commissioner at the treaty which the proprietors propose to hold during the enduing summer with said Indians for this object," informed Mr. Forward that he had been selected by the President for the performance of this duty. The letter proceeded:

87 "You are accordingly requested to correspond with the proprietors and to attend the treaty at such time as may be fixed on by them for holding it, to see that all the proceedings are

just and fair. Whatever may be done must be done with the free consent of the Indians. You will, however, exercise a sound discretion in the business, and, if satisfied with the fairness of the propositions of the proprietors, will afford them such co-operation in effecting them as you may judge proper." On the 24th of February, 1827, the President of the United States transmitted to the United States Senate a copy of the treaty or conveyance of August 31, 1826, together with other papers, including a report from Thomas L. McKenny, superintendent of Indian affairs, relating to said treaty, made to the Secretary of War under date of February 16, 1827. In this report the superintendent stated that "in pursuance of law and usage an agent in the person of Oliver Forward was appointed to represent the United States under instructions from the Department of War and to sanction, in behalf of the United States, the proceedings under said treaty. This trust has been executed." The report then referred to the provisions of section 12 of the Indian intercourse law of 1802, and, after quoting the language of the proviso in that section, said: "In conclusion, those treaties hitherto made under such circumstances were submitted to the Senate, except the treaty with the Senecas of the 3d of September, 1823, executed in the presence of Charles Carroll, commissioner on the part of the United States. It was deemed a useless ceremony, the President approving it only." The treaty of September 3, 1823,
88 referred to in the report, was a conveyance substantially like the one in question (Indian Treaties 1837, pg. 305). The Senate, on receiving the communication from the President, referred the "treaty with the Seneca Indians" to the Committee on Indian Affairs, and afterwards, on its being reported back to the Senate, that body refused to ratify it, but the Senate passed an explanatory resolution, as follows: "Resolved, That by the refusal of the Senate to ratify the treaty with the Seneca Indians it is not intended to express any disapprobation of the terms of the contract entered into by the individuals who are parties to that contract, but merely to disclaim any power over the subject-matter." No further action has been taken by the United States, except that in 1855, in pursuance of the 3d section of the act of Congress approved June 27, 1846, which authorized the President to receive from the Ontario bank any public stocks or moneys which said bank might hold in trust for the Seneca Indians, the fund of $43,050, above mentioned, was transferred to the United States Treasury, and thereafter, as has been stated, interest thereon has been paid annually to the Seneca Indians by the United States.

It is among the agreed facts of the case that soon after the execution of the deed of August 31, 1826, Troup, Ogden, and Rogers entered into full and exclusive possession of the lands embraced in the grant, with the consent of the Seneca nation; that in or about the year 1828 a boundary line between the lands conveyed and the remaining lands of the Seneca nation was surveyed and plainly
89 marked and blazed, which has ever since been recognized by the plaintiff and the successive grantees of Troup, Ogden and Rogers; that the lands embraced in the grant have been subdivided

and sold to purchasers, and that extensive and valuable improvements have been made thereon in reliance upon the title under the grant of August 31, 1826. Indeed, it is matter of common history that the lands have become the sites of flourishing towns and villages and cultivated farms, and are now the abode of thousands of people pursuing the avocations of civilized life.

There are certain facts antedating the transaction of August 31, 1826, which have an important bearing upon the question in this case. The compact entered into between the States of New York and Massachusetts on the 16th of December, 1786, was the settlement of a controversy which had arisen between the colonies of New York and Massachusetts, which was pending at the time of the Revolution, respecting the right of sovereignty and jurisdiction over a very large territory within the chartered limits of the province of New York, but which was claimed by Massachusetts to be included within the limits of the earlier charter of the colony of Massachusetts bay. The dispute, still unsettled, was after the Articles of Confederation brought by Massachusetts to the attention of the Congress by petition praying for the appointment of commissioners for the settlement of its claim, in pursuance of the Articles of Confederation, and Congress was proceeding to appoint commissioners when further action on its part was arrested by the appointment by voluntary agreement between the two States of commissioners to adjust the controversy. These commissioners, in behalf of their respective States, entered into the compact referred to. By this com-
90 pact Massachusetts ceded to the State of New York the right of government, sovereignty, and jurisdiction over the whole territory in dispute, and New York ceded to Massachusetts the right of pre-emption of the soil and to extinguish the Indian title to about 6,000,000 acres of land in the western part of the State of New York, described in the treaty, Massachusetts surrendering to New York all claim to any other territory therein. By the 9th article of the treaty Massachusetts was authorized to treat with the native Indians for acquiring the right of soil in the territory thereby ceded to Massachusetts The 10th article is as follows: "Tenthly. The Commonwealth of Massachusetts may grant the right of pre-emption of the whole or any part of the said lands and territories to any person or persons who by virtue of such grant shall have a good right to extinguish by purchase the claims of the native Indians, providing, however, that no purchase from the native Indians by any such grantees shall be valid unless the same shall be made in the presence of and approved by a superintendent to be appointed for such purpose by the Commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the Commonwealth of Massachusetts." This compact, after the adoption of the Constitution of the United States and prior to the grant of August 31, 1826, was formal-y ratified and approved by Congress, whose consent was made necessary both by the Articles of Confederation and by the Federal Constitution to any compact between the States. In 1791 the State of Massachusetts con-
91 veyed its title and interest in and to about 5,000,000 acres of

the lands ceded to it by the treaty of 1786, subject to the Indian right, to Robert Morris, of Philadelphia, who subsequently conveyed the greater portion to persons constituting the Holland Land Company, who afterwards, prior to 1826, conveyed the tract of 98,000 acres embraced in the deed of the Seneca Indians of August 31, 1826, to Troup, Ogden, and Rogers, the grantees in that deed. The pre-emption right to that part of the territory included in the cession to Massachusetts not embraced in the conveyance to Morris in 1791 had, prior to that date and on July 4, 1788, been sold by that State to Oliver Phelps (known as the Phelps and Gorham purchase), being a large tract off the eastern side of the lands embraced in the compact of 1786.

It is material to observe that there was no uniform procedure on the part of the purchasers from Massachusetts in acquiring the Indian title.

In 1788, at a council of the Seneca Indians held at Buffalo Creek, which was attended by Mr. Phelps and by an agent of Massachusetts, a treaty was made by which the Indians conveyed to Phelps, for a consideration agreed upon, the lands embraced in the Phelps and Gorham purchase. The United States was not represented at this treaty, nor was any agent specially appointed in behalf of New York present at its execution. Under this title all the lands embraced in that treaty are now held. The validity of this grant, made without the intervention of the State or Federal authorities, is impliedly recognized in the Pickering treaty between the United States and the Six Nations, proclaimed January 21, 1895, which, in de-
92 fining the lands of the Senecas, commences the description, "Beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps," and that tract is not embraced in the description. On the 15th of September, 1797, at a public council of the Seneca Indians held at Geneva, in the county of Ontario, the Indians conveyed to Robert Morris all the lands embraced in his purchase from Massachusetts, excepting certain Indian reservations, for the sum of $100,000. It is recited in the conveyance that it was made "at a treaty held under the authority of the United States by the Honorable Jeremiah Wadsworth, a commissioner appointed by the President of the United States to hold the same," etc. There was also present at this treaty a commissioner on the part of Massachusetts. This treaty was between the Indians and Morris, under the supervision of the commissioners named. It was not a treaty between the United States and the Indians; at least, no such treaty is found in the volume of Indian Treaties (7 U. S. St. at Large). This grant is the origin of the title derived from the Indians to the lands known as the "Holland purchase" and the "Morris reserve," in this State.

The Indian grant to Troup, Ogden, and Rogers of August 31, 1826, was the next large transaction for the extinguishment of the Indian title to lands embraced in the cession to Massachusetts. The lands were part of the lands reserved by the Indians in the treaty with Morris of 1797. The circumstances under which the grant of 1826 was made have already been stated.

Notwithstanding these grants to Phelps, Morris and Troup, Ogden and Rogers, there were still left in the possession of the Senecas
93 several large reservations to which the Indian title had not been extinguished. By treaties entered into between the United States and the Six Nations, of January 15, 1838, and between the United States and the Seneca Nation, of May 20, 1842, and the grants contemporaneously made, the right of the Seneca nation to all the reservations excepting two was conveyed to the grantees, who were also the holders of the right of pre-emption under the Massachusetts title.

The United States was not a mere formal party to the treaties of 1838 and 1842. They contained stipulations relating to the removal of the Senecas to lands in the West, and the United States incurred obligations which made it a necessary party to the treaties. It is, however, worthy of observation that Ogden and Fellows, the assignees of the pre-emptive title of Massachusetts and to whom the Senecas at the treaty of 1838 granted their remaining lands, did not take their title under any stipulation in the treaty, but by deed contemporaneously executed by the Indians directly to them. The treaty simply recites the fact that at the making of the treaty Ogden and Fellows, the assignee- of Massachusetts, had purchased the lands of the Senecas in the presence and with the approbation of the United States commissioner.

By the successive transactions to which reference has been made nearly all the lands of the Senecas, originally embracing all the territory west of Seneca lake, within this State, have been purchased from them, and all that is retained by the Senecas of their original possessions is a comparatively small territory, now the home of the remnant of this once powerful tribe.

94 It is the contention in behalf of the plaintiff that the grant to Troup, Ogden, and Rogers of August 31, 1826, was void and wholly ineffectual to extinguish the Indian title to the lands which it purported to grant. It is conceded that the grant was made at a public council of the Seneca nation; that it was duly executed by the sachems, chiefs, and warriors in pursuance of a purchase openly and fairly made and without fraud; that the grantees held and owned the exclusive right to extinguish the Indian title to the lands granted, as assignees of the rights of Massachusetts under the compact of 1786; that the negotiation for the purchase was made and concluded and the deed executed in the presence of a commissioner of the United States and of a commissioner of the State of Massachusetts, and that the sale was afterwards duly confirmed by the legislature of that State, as provided in the compact; that at least $43,050 of the consideration agreed upon was paid by the purchasers and received by the Seneca nation; that the deed was duly recorded, and that the lands embraced therein were thereafter surrendered by the tribe to the grantees, the Indians abandoning the possession, and finally that for a period of more than half a century since the purchase was made the lands have been in the undisputed possession of the grantees in the deed and purchasers under them, claiming title under the grant, and without protest on the part of

the State or Federal Government or on the part of the Seneca Indians, until at or about the time of the commencement of this litigation.

95 The claim of the plaintiff to undo this transaction and to be restored to the lands thus solemnly granted is based on two general propositions: First, that from the time of the adoption of the Constitution of the United States no valid purchase of Indian lands could be made except under and in pursuance of a treaty between the United States and the tribe in occupation of the lands, entered into and executed under the treaty-making power conferred on the President and Senate by that instrument; and, second, that even if the mode of dealing with the Indians adopted in the present case was not, in the absence of any prohibitory legislation by Congress, in contravention of the Constitution, nevertheless the purchase of August 31, 1826, was invalid for the reason that it was made in violation of the 12th section of the act of Congress passed March 30, 1802, entitled "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers."

These claims challenge the title not only of every purchaser and holder of lands within the boundaries of the grant of August 31, 1826, but also the title to many millions of acres of lands in this State held under Indian treaties made by the State of New York with the Indians tribes within its borders or under grants made by Indians to individuals under the authority of the State where no treaty had been made between the United States and the Indian occupants.

The nature of the Indian title to lands on this continent was established by the system of public law adopted by European nations regulating their possessions here. It became the recognized

96 principle that discovery followed by possession vested in the sovereign by whose subjects the discovery was made the absolute title to the soil of the lands within the limits of the discovered territory, subject, however, to the right of occupation by the Indian tribes, which could only be extinguished by their voluntary consent unless forfeited under the laws of war. It was a necessary sequence to the claim that the sovereign had the ultimate title to the soil that the right to extinguish the Indian occupation was exclusively vested in the sovereign. The Indians were held to be incapable of alienating their lands except to the Crown, and all purchases made from them without its consent were regarded and treated as absolutely void. The title of the Crown was subject to grant, but a grant from the Crown only conveyed the fee subject to the right of Indian occupation, and when that was extinguished under the sanction of the Crown the possession then attached to the fee, and the title of the grantee was thereby perfected. These general principles were announced by Chief Justice Marshall in the great case of Johnson *v.* M'Intosh (8 Wheat., 543), which has ever since been regarded as a sound exposition of the nature of Indian titles.

The several colonial charters undertook to define the territorial limits of the respective colonies. In many cases the boundaries

were indefinite and in some cases conflicting. The Crown, however, except in case of proprietary charters, exercised the right of making grants of unappropriated lands within the chartered limits of the colonies, although the right of soil and jurisdiction was
97 vested in the colonial governments. On the Declaration of Independence the colonies became sovereign States. They were so acknowledged by the treaty of peace of 1783, and Great Britain by that treaty "relinquished all claims to the government, property, and territorial rights" within the several colonies. It is the received opinion that the colonies succeeded to the title of the Crown to all the ungranted lands within their respective boundaries, with the exclusive right to extinguish by purchase the Indian title and to regulate dealings with the Indian tribes. "There was no territory in the United States," said Johnson, J., in Harcourt *v.* Gaillard (12 Wheat., 523), "that was claimed in any other right than that of one of the confederated States. Therefore there could be no acquisition of territory made by the United States distinct from or independent of some one of the United States."

There was a controversy between the States and the United States as to the claim of the former to territory extending indefinitely westward, far beyond the limit of settlement, and whether the charters could be fairly construed to include these indefinite regions, which controversy, however, was happily compromised by cessions made by six of the States to the United States of territory claimed by them, commencing with that of New York of March 1, 1781, and including the memorable cession of the Northwestern Territory by Virginia in 1784. (See Clark *v.* Smith, 13 Pet., 195; Fletcher *v.* Peck, 6 Cranch, 142.) This was the beginning of the acknowledged
98 territorial possessions of the Government of the United States, subsequently largely increased by purchases from France and Spain.

The original States, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the Crown, to treat with the Indians, and this they did independently of the Government of the United States. This was notably true of the State of New York. Laws were enacted from time to time by the legislature of the State authorizing treaties with the Indians. (See Laws of 1784, ch. 22; Laws of 1788, ch. 47; Laws of 1813, ch. 29, sec. 52; Laws of 1839, ch. 58; Laws of 1831, ch. 234.) In 1788 the State entered into treaties with the Onondagas and Oneidas, and in 1789 with the Cayugas, whereby it acquired the title to large tracts of land in the central part of the State, and many subsequent treaties were made with these tribes by which the State finally acquired nearly all their remaining lands. Similar treaties were made with the St. Regis, Mohawk, and Seneca Indians. In all, more than thirty treaties were made between the State and various tribes, independently and without the intervention of the Government of the United States. (See Collection of State Treaties; Assembly Document, 1889, in Report

on Indian Problem.) They were generally negotiated by commissioners appointed by the legislature, acting in conjunction with the governor of the State. It appears that on two or three occasions a commissioner of the United States was present when treaties
99 were made. But in all cases the State and not the United States was the contracting party with the Indians. The treaties were in no sense treaties made by the President and Senate of the United States. The list of governors who participated in making them embraces many of the great named in the history of the State. It includes the Clintons, Tompkins, Van Buren, Marcy, Wright, Seward. By virtue of these treaties this State entered upon the lands acquired thereby, and they have been sold and built upon and improved and comprise some of the fairest and most prosperous districts of the State. It is evident that the eminent statesmen who participated in these negotiations did not understand that the prohibition in the Federal Constitution that "no State shall enter into any treaty, alliance, or confederation" (art. 1, sec. 10), or the other provision vesting the treaty-making power in the President and Senate (art. 2, sec. 2, subd. 2), prevented the State from negotiating with the Indian tribes therein for the extinguishment of the Indian title. It is worthy of observation that the Articles of Confederation also vested in Congress the exclusive power of entering into treaties and alliances (art. IX). The United States, under the Articles of Confederation and afterwards under the Federal Constitution, assumed the position of protector of the Indian tribes. Concurrently with and as a consequence of the cessions made by the several States to the United States national interests were created in respect of the Indian lands of which the General Government had become the proprietor. In dealing with the Indians the
100 General Government for a long period treated the Indians as quasi-independent nations. Their position was anomalous. Their domestic affairs were regulated to a great extent by the rules and usages of the several tribes, and they were regarded as possessing some of the characteristics of a distinct political community. Treaties were made with them from time to time by the United States. One of the earliest of these was the treaty of Fort Stanwix, made with the Six Nations on the 22nd of December, 1784, which established the boundary between their lands and the lands ceded by the States to the United States. This was followed by the so-called Pickering treaty, between the same parties, of 1795, and by a large number of other treaties with Indian tribes throughout the United States.

It cannot, we suppose, be questioned that these treaties were constitutionally made in the exercise of the treaty-making power of the Federal Government, and became under the Constitution the supreme law. But the dealing by the General Government with the Indian tribes through treaties was resorted to as a convenient mode of regulating Indian affairs, and not because, as with other nations, it was the only mode, independently of the arbitrament of war, of dealing with them. The policy of the General Government in dealing with the Indians through treaties and of regarding the

Indian tribes as in some sense nations, which prevailed for nearly a century, has been radically changed by recent congressional legislation. The act of Congress of March 3, 1871, prohibits further dealing with the Indian nations or tribes by treaties. It enacts that "no Indian nation or tribe within the territory of the
101 United States shall be regarded or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty." The act of Congress of March 3, 1885, extending the jurisdiction of the United States courts over crimes committed by or against Indians on their reservations, and the act of February 8, 1887, providing for the holding of Indian lands in severalty by the members of certain tribes, indicate the same policy on the part of the General Government to change the method of dealing with the Indians through treaties and substituting therefor control through Federal legislation. (See U. S. *v.* Kagama, 118 U. S., 375.)

While the former policy prevailed the making of treaties by the original States having the pre-emption title to the Indian lands within their limits directly with the Indians was not regarded by the General Government as inconsistent with Federal jurisdiction or as in contravention of the provision in the Federal Constitution prohibiting a State from entering into "any treaty, alliance, or confederation." The State did not so regard it, as the numerous treaties made by it show. That the same view was taken by the General Government appears from the Pickering treaty of 1795, which expressly recognized the validity of the treaties of 1788 and 1789 made between this State and the Oneida, Onondaga, and Cayuga nations. By the second article of that treaty "the United States acknowledged the lands reserved to the Oneida, Onondaga, and Cayuga nations in their respective treaties with the State of New York and called their reservations to be their property." The compact between New York and Massachusetts expressly author-
102 izes Massachusetts or its grantees to treat with the native Indians for the purchase of their title to lands ceded, and this compact was ratified by Congress after the adoption of the Constitution. The practical construction given by the State of New York to the Federal Constitution, as shown by the numerous treaties made by it with the Indian tribes, and the recognition by the Federal authority of their validity is very strong evidence that the clause in the Federal Constitution prohibiting the States from entering into treaties does not preclude a State having the pre-emption right to Indian lands from dealing with the Indian tribes directly for the extinguishment of the Indian title. Such a dealing is not a treaty in the constitutional sense and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands. The remark of Justice McLean, in his opinion in Worcester *v.* State of Georgia (6 Pet., 580), that "under the Constitution no State can enter into any treaty, and it is believed that since its adoption no State under its own authority has held a treaty with the Indians," was true as referring to treaties for lands owned by the General

Government, but if intended to have a broader scope seems opposed to the facts of history. The circumstance that Gov. George Clinton in 1793, after the passage of the Indian intercourse act of that year, transmitted to Mr. Jefferson, then Secretary of State of the United States, exemplified copies of the different treaties entered into by the State of New York with the various tribes of Indians
103 within its borders, which treaties Congress afterwards formally approved, does not militate against the view that the right of the State to enter into those treaties was not prohibited by the Constitution. The treaties had gone into effect and had been executed, and the act of Governor Clinton was a prudential measure to remove any possible cloud upon the action of the State.

As to the first contention made in behalf of the plaintiff, we are therefore of opinion that the State of New York had the power and right, under the Constitution, to make treaties with the Indian tribes within the State for the purchase of their lands, to which it held the pre-emptive right, and that the purchase of August 31, 1826, having been duly made under its authority in pursuance of the compact with Massachusetts of 1786, in the presence and with the approval of commissioners both of Massachusetts and of the United States, was valid, and that the purchasers on the execution of the deed of that date, followed by the voluntary surrender and abandonment by the Indian occupants of the land granted, acquired a lawful and valid title in fee-simple absolute, and that a treaty between the United States and the Senecas was not necessary to give validity to the transaction.

The second general proposition asserted by the plaintiff, viz., that the grant of August 31, 1826, was invalid under the 12th section of the Indian intercourse act of Congress of 1802, remains to be considered. That section is as follows:

"SEC. 12. And be it further enacted, That no purchase, grant, lease or other conveyance of lands, or any title or claim thereto,
104 from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution; and it shall be a misdemeanor in any person not employed under the authority of the United States to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian, nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months; provided, nevertheless, that it shall be lawful for the agent or agents of any State who may be present at a treaty held with Indians, under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to and adjust with the Indians the compensation to be made for their claims to lands within such State, which shall be extinguished by treaty."

By the 3d clause of section 8, tit. 1, of the Federal Constitution, power is given to Congress "to regulate commerce with foreign na-

tions and among the several States and with the Indian tribes," and the act of 1802 was passed in part execution of the authority. This clause in the Constitution is construed as extending the power of Congress to the regulation of intercourse with Indian tribes residing within as well as those residing without the limits of the States. (Sto. on Con., sec. 1100; opinion of McLean, J., Worcester *vs.* State of Georgia, *supra.*)

105 There is room for question whether the act of 1802 was intended to apply to treaties made by a sovereign State with tribes within the State for the extinguishment of the Indian title to lands therein, or, assuming that such treaties were, as a general rule, within the purview of the statute, whether the act was intended to apply to and regulate the manner of acquiring the Indian title to lands embraced within the compact between Massachusetts and New York, which compact, afterwards ratified by Congress, specifically authorized treaties to be made by Massachusetts with the Indians and purchases to be made by the grantees of Massachusetts, subject only to the condition that they should be made under the supervision of a commissioner of that State and confirmed by the legislature.

But, assuming that the statute applies to the transaction of August 31, 1826, we are of the opinion that the purchase then made was not in violation of the true meaning and effect of the 12th section. It is important to consider the circumstances then existing. The United States by virtue of the cessions made by the States was the owner of a large territory in the possession of the Indian tribes, with the exclusive right of pre-emption. No State nor foreign power nor any company or individual could treat for or acquire the Indian title to such lands except by the sanction and under the authority of the United States. The State of New York and the other States were at the same time owners of lands in the occupation of Indian tribes within their respective limits, also having the exclusive power to extinguish the Indian title thereto.

106 The United States could not impair the title of the States, nor purchase the lands, nor authorize any purchase without the consent of the State within which they were situated. Before the Revolution the right to regulate trade with the Indians within the colonies was understood to belong to the prerogative of the Crown (Sto. on Const., sec. 1099), and a license from the Crown was necessary to enable individuals to purchase the Indian title, and purchases made with such license were valid. "It was," said Baldwin, J., in Mitchel *v.* U. S., 9 Pet., 748, "the universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by authority of the Crown, gave a valid title to the lands. It prevailed under the laws of the States after the Revolution and yet continues in them where the right to the ultimate fee is owned by the States or the grantee. It has been adopted by the United States, and purchases made at treaties held by their authority have always been held good by the ratification of the treaty without any patent to the purchasers from the United States." From this practice in colonial times, that a representative of the Crown should be present

and approve purchases from the Indians in order to make them valid, there naturally grew up the idea of Federal supervision in these cases.

In the light of these circumstances the 12th section of the act of 1802 was enacted. The first part of the section invalidates any purchase of Indian lands except when made in pursuance of a
107 constitutional treaty—that is, a treaty entered into between an Indian nation or tribe and the United States, by the President, with the consent of the Senate. This clause has a peculiarly appropriate application to purchases of Indian lands owned by the United States for the sale of which its consent was indispensable. The proviso was intended to except from the sweeping scope of the first part of the section dealings with the Indian tribes for the purchase of their right to lands within the States and of which the States owned the pre-emptive title. It was therefore provided that purchases in these cases might be made by the agents of any State present at any treaty held under the authority of the United States in the presence and with the approbation of the United States commissioner appointed to hold the same. The purchase must be made a treaty, as in other cases. This insures publicity and affords a protection against fraud. But the proviso does not require that the treaty should be one between the United States and the tribe from whom the purchase is made, as in the cases coming under the first clause of the section. It is sufficient if the purchase is made at a treaty held "under the authority of the United States" and in the "presence and with the approbation of the commissioner or commissioners of the United States," etc. The proviso would have little, if any, meaning if construed as requiring a formal constitutional treaty in these cases, which were manifestly intended to be excepted from the operation of the primary clause.

108 The true spirit and intent of the proviso was, we think, to permit the State or its agents to enter into a treaty or convention with an Indian tribe within its borders for the purchase of a pre-emptive right, provided it was entered into in the presence of and with the approval of a commissioner of the United States appointed to attend the same, and that such a treaty is, within the true meaning of the proviso, a treaty held under the authority of the United States, and requires no ratification or proclamation by the Federal authorities. The policy of the State of New York has been in full accord with that of the United States in prohibiting all private dealings with and purchases from Indians except under the supervision of public officials and with the consent of the legislature. (Const. 1777, art. 37; *id.* 1822, art. 7, sec. 12; *id.* 1846, art. 1, sec. 16.)

The purpose of the proviso in the 12th section of the act of 1802 was to establish a Federal supervision over contracts for the extinguishment of Indian title to lands within the several States, while in other cases such extinguishment was to be effected only by formal treaties between the United States and the Indian tribes. It is very significant of the construction of section 12 of the act of 1802 that the first Indian intercourse act of Congress, passed July 22, 1790,

declared that no sale of lands within the United States made by any Indians or nation or tribe of Indians should be valid to any person or persons "or to any State, whether having the right of pre-emption or not," unless made at some public treaty, etc. The
109 clause quoted was omitted in the next act of 1793, and a section was inserted with a proviso substantially like section 12 in the permanent act of 1802. This change indicates that it was the intention of Congress to place purchases of Indian lands within the States upon a different footing than other purchases.

The purchase of August 31, 1826, was made in conformity with the compact between New York and Massachusetts. The commissioner of Massachusetts was present and approved the purchase, and it was sanctioned by the legislature of that State. The United States commissioner was also present. No agent of the State of New York, specially appointed as such, conducted the negotiations with the Indians. The State of New York accepted the result of the negotiations by subjecting the lands to taxation and exercising full jurisdiction over the same from the time of the purchase. The State treated the purchase as though made by its authority, and the agent of Massachusetts, in view of the compact of 1786, may properly be regarded as the agent of New York in the transaction, within the proviso of the act of 1802. The Federal authorities also treated the transaction as formal and regular, as is indicated by the action of the Executive Department of the United States Government and of the Senate of the United States. The Secretary of War designated a commissioner to attend on behalf of the United States at (as is stated in the commission) "a treaty which the proprietors proposed to hold," etc. The papers transmitted to the Senate
110 were accompanied by a communication from the Department of Indian Affairs, in which the opinion was expressed that the Department regarded the transaction one which did not require the consent of the Senate under the treaty-making power. The Senate accompanied its refusal to ratify it by a resolution which, while it recognized the transaction as a "treaty with the Seneca Indians," declared that in the judgment of the Senate "there was no necessity" for its interference.

Upon full consideration we are of opinion that the grant of August 21, 1826, was a valid transaction and was not in contravention of the provisions of the Federal Constitution or of the Indian intercourse act of 1802, and vested in the purchasers a good title in fee-simple absolute to the lands granted, free from any claim of the Seneca nation.

The affirmance of the judgment below might be placed on the narrower ground that, conceding the invalidity of the grant of August 31, 1826, under the Indian intercourse act of 1802, nevertheless the title was subsequently confirmed and made good by the act of Congress of 1846, authorizing the President to receive from the Ontario bank and deposit in the Treasury of the United States the money and securities representing the purchase-money of the lands, followed by the transfer of the fund to the United States in 1855. The United States, which imposed the restriction, could waive it

and give effect thereby to the intention of the parties to the grant, and the act of receiving the fund under a Federal statute and administering it for many years as a trust fund for the benefit
111 of the plaintiffs furnishes the most emphatic evidence of a ratification on its part of the transaction from which the fund was derived.

We are also of opinion that as the right of the plaintiff to sue was given by and is dependent upon the statute, chapter 150 of the Laws of 1845 (see Strong *v.* Waterman, 11 Pai., 607), the statute of limitations is a bar to the action. By the act of 1845 the actions thereby authorized are to be brought and maintained "in the same time" as if brought by citizens of the State. The question is not whether an Indian title can be barred by adverse possession or by State statutes of limitation. The point is that the plaintiff cannot invoke the special remedy given by the statute without being bound by the conditions upon which it is given.

In view of the numerous Indian titles in this State originating in treaties by the State or in purchases made with its sanction by individuals, we prefer to place our judgment on the broader ground, which will remove any cloud upon the validity of those titles.

As to the point that it does not affirmatively appear that the whole of the purchase-money was paid by Troup, Ogden, and Rogers, it is sufficient to say that full payment is acknowledged in the deed, and that if this were not so it would, under the circumstances, be presumed.

These views lead to an affirmance of the judgments below. All concur.

Judgments affirmed.

112 [Endorsed:] Supreme court. The Seneca Nation of Indians, plaintiff, against Harrison B. Christy, defendant. Certified copy of opinion and stipulation. Sprague, Morey, Sprague & Brownell, attorneys for def't; office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y. Due and personal service of — cop- of the within — is hereby admitted this — day of ——, 189–. —— ——, attorney for —.

STATE OF NEW YORK, *Erie County Clerk's Office,* } ss:

I, Charles N. Brayton, clerk of said county, do hereby certify that I have compared the annexed copy opinion and stipulation and copy endorsements thereon with an original thereof and its endorsements entered and on file in this office and find the same to be true transcripts of and from the said originals and the whole of each thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 31 day of Oct., 1893.

[Seal of Clerk's Office for the County of Erie, N. Y.]

C. N. BRAYTON, *Clerk.*

113 At a special term of the supreme court, held at the city and county hall, in the city of Buffalo, N. Y., on the 26th day of October, 1893.

Present: Hon. Henry A. Childs, justice.

Supreme Court, Erie County.

THE SENECA NATION OF INDIANS
against
HARRISON B. CHRISTY.

On reading and filing the stipulation of the attorneys for the respective parties in the above-entitled action to such effect, dated Sept. 7, 1893, and a certified copy of the opinion of the court of appeals rendered upon the appeal taken to that court from the judgment in this action, and on motion of Sprague, Morey, Sprague & Brownell, attorneys for the defendant, it is ordered that said certified copy of the opinion of the court of appeals be filed with the record herein, with said stipulation, in the office of the county clerk of Erie county, and that a copy of such opinion and of such stipulation and of this order be certified as a part of the return to the writ of error heretofore taken by the plaintiff herein to the Supreme Court of the United States, and that the same shall thereupon become a part of such return. C. N. BRAYTON, *Clerk.*

114 [Endorsed:] Supreme court, Erie county. The Seneca Nation of Indians, plaintiff, against Harrison B. Christy, defendant. Ex'ct copy order. Sprague, Morey, Sprague & Brownell, attorneys for def't; office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y. 13–362. Clerk's office, Erie county, N. Y. Filed Nov. 4, 1893. J. Due and personal service of — cop- of the within — is hereby admitted this — day of ——, 189–. ——— ———, attorney for —.

STATE OF NEW YORK,
Erie County Clerk's Office, } ss:

I, Charles N. Brayton, clerk of said county, do hereby certify that I have compared the annexed copy order and copy endorsements thereon with an original thereof and its endorsements entered and on file in this office and find the same to be true transcripts of and from the said originals and the whole of each thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 1st day of Dec., 1893.

[Seal of Clerk's Office for the County of Erie, N. Y.]

C. N. BRAYTON, *Clerk.*

115 [Endorsed:] Case No. 15,182. Supreme Court U. S., October term, 1893. Term No., 843. The Seneca Nation of Indians, P. E., *vs.* Harrison B. Christy. Stipulation and addition to record. Filed Dec. 4, 1893.

Endorsed on cover: Case No. 15,182. New York supreme court. Term No., 469. The Seneca Nation of Indians, plaintiff in error, *vs.* Harrison B. Christy. Filed October 29th, 1892.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, 1894.

THE SENECA NATION OF INDIANS,
Plaintiff in Error,
vs.
HARRISON B. CHRISTY,
Defendant in Error.

No. ~~169~~. 180

Brief of James C. Strong, Attorney and Counsel for Plaintiff in Error.

BUFFALO:
W. H. WRIGHT, JR., PRINTER,
18 & 20 ELLICOTT ST.
1895.

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, 1894.

THE SENECA NATION OF INDIANS, *Plaintiff in Error,* vs. HARRISON B. CHRISTY, *Defendant in Error.*	No. 469.

BRIEF AND ARGUMENT

Of Plaintiff in Error, upon motions to dismiss the writ of error.

STATEMENT.

This cause was brought from the Supreme Court of the State of New York, by a writ of error, as seen on page 39 of printed record. It is an action of ejectment commenced on the 13th day of October, 1885.

The plaintiff is a Nation of Indians, and is one of the tribes belonging to the Six Nations, and have from time immemorial resided, and still reside upon the Cattaraugus and Allegany Reservations in the State of New York, and claim title to the land in question, (which is a part of the Cattaraugus Reservation,) by reason of such immemorial occupancy, and also under and by virtue of a Treaty made by and between it and the United States of America, dated November 11th, 1794, (Vol. 7, U. S. Statutes at large pp. 44 and 47. Printed record, page 17,) by which treaty, the United States granted the land in question, (with others) to the plaintiff.

The defendant claims title to said lands under a "treaty" made on the 31st day of August, 1826, by and between the plaintiff and Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, which purports to convey the said premises (with others) to said parties of the second part, and under sundry mense conveyances from said Troup, Ogden and Rogers to the defendant.

The defendant also claims title to said lands by reason of twenty years adverse possession. (Printed record, page 3.)

The case was heard at a special term of the Supreme Court of the State of New York, and a verdict for defendant, directed by the Court.

It was then appealed to the General Term of said Court for the 5th Department, and the verdict of the Court below was affirmed. The case was then carried to the Court of Appeals, and the judgment of the General Term was there affirmed. A

writ of error was then granted, and the case is now pending in this Court.

The question upon the *merits* of this case is,

"Was the 'treaty' of August 31st, 1826, good and valid, and did it convey the title to the lands in question?"

But the case is not *now* before this Court upon its *merits*, it is brought up upon two motions made by the defendant to dismiss the writ of error,

1st.

"Upon the jurisdictional ground, that no *federal question* was necessarily involved in the judgment of the State Court," and

2nd,

That the appeal was taken "for delay only."

BRIEF.

Of plaintiff in error upon the motions to dismiss the writ of error.

I.

Whether the treaty of August 31, 1826, *required* ratification by the Senate, and proclamation by the President, to make it a good and valid treaty to pass title to Indian lands, *is* a *federal question.*

§ 3, Sec. 8, Art. 1, U. S. Constitution.
§ 2, Sec. 2, Art. 2, U. S. Constitution.
Act of Congress of March 30, 1802, Chap. 13, Vol. 2, U. S. Laws, p. 460.

This is the vital question in the case, and depends

solely upon the construction of the Constitution of the United States, and the Acts of Congress.

Such construction *is* a *federal question*, and is directly within the jurisdiction of this Court.

It was *necessarily* involved in the decision of this case, and the Court of Appeals so thought, and argued it at great length, finally deciding that,—

"Upon full consideration we are of opinion that the grant of August 31st, 1826, was a valid transaction *and was not in contravention of the provisions of the Federal Constitution, or of the Indian intercourse act of 1802.*"

Printed record, Marginal page 110.

Any question involving the alienation of land that has been granted to the Indians by the United States, and the peaceable and undisturbed possession of which has also been guaranteed to them *by* the United States, is *a federal question.* The land in question was so granted and guaranteed.

Treaty between the United States and plaintiff dated November 11, 1794. Vol. 1, Statutes at Large, pp. 44 and 47. Printed record p. 17.

II.

Did section 3, of Chapter 34 of the Laws of Congress of 1846, act as a ratification of the treaty of August 31, 1826 ?

It is conceded by the defendant, that the treaty

of August 31st, 1826, was *not* ratified by the Senate, or proclaimed by the President; but he contends that said section 3 of the Act of 1846, had the same effect, and did in fact ratify the treaty.

The Court of Appeals sustained this contention of the defendant, and made it one of the questions in the case. The Court say—

"The affirmance of the judgment of the Court below might be placed on the narrower ground that, conceding the invalidity of the grant of August 31st, 1826, under the Indian intercourse act of 1802, *nevertheless, the title was subsequently confirmed and made good by the act of Congress of 1846.*"

Printed record, Marg. page 110.

The Court will see by referring to the "Trust deed given by the Ontario County Bank" (marginal page 37, of record), that the bank should hold the money until "the said nation shall in public council authorize a transfer of the said stock to the United States of America, or to the President thereof," and when Troup, Ogden and Rogers "shall in writing under their hands also authorize such transfer." There is no proof that the Seneca Nation *ever* authorized the transfer, and in fact never did.

Again,

It was provided in said deed of trust, that if such authorization was not given within *two years* "that we" (the bank) "may discharge ourselves of the said trust by *reassigning* the said stock *to the said Robert Troup, Thomas Ludlow Ogden and Benjamin W. Rogers.*"

By this it will be seen that the stocks never absolutely passed out of the possession of Troup, Ogden and Rogers. They had a string tied to them all the time.

This two years was evidently given for the express purpose of giving time for the parties to get the deed ratified by the Senate, and they sent it on immediately for that purpose.

It is self evident that the parties, (the Bank included) did not consider the transfer as valid, unless the treaty was confirmed by the Senate. Else why should the stocks be transferred back to Troup, Ogden and Rogers, without the Indians having anything to say about it.

The stock was not transferred back however, but was held by the Bank until *the expiration of its Charter*, and the stocks were transferred to the United States BECAUSE *of the expiration of the Charter of the Bank*, (Mar. page 39 of record) and the Act of 1846 was passed to enable it to do so, *for that reason*, and for that purpose *only*, and had no reference whatever to the ratification of the treaty.

That the Charter of the Bank was about to expire, was a *sufficient* reason for the passage of the Act of 1846.

Again

If the treaty required ratification, it could not have been ratified by an Act of Congress. The Constitution provides the only manner in which a treaty can be ratified, and an Act of Congress cannot override or change the Constitution.

The construction of the act of 1846, was also a *federal question*, directly within the jurisdiction of this Court.

III.

Is the Statute of Limitations a bar to this action?

The question as to whether it is or not, becomes a *federal one*, when its application effects the *title to lands belonging to Indians*, who are the wards of the United States Government.

It is contended upon the part of the defendant, that the words, "*within the same time*," etc. of Chapter 150, of the Laws of 1845, of the State of New York, makes the statute of limitations, a bar to this action, and the Court of Appeals sustained his contention.

The Court say—

"We are also of the opinion that as the right of the plaintiff to sue was given by, and is dependent upon the Statute, (Chapter 150 of the Laws of 1845), the statute of limitations is a bar to this action."

Printed record, Marg. page 111.

The honorable Court of Appeals draws a very fine and untenable distinction in its reason for holding the statute a bar. (See opinion marg. p. 111.) The reason is immaterial however, the *result* is the same. If its decision is correct, the Indians *lose* their lands, and the whites get them, *by reason of adverse possession.*

The Court virtually admits however, that the title to Indian lands cannot be obtained by adverse possession, or by State statutes of limitation, for it says, in the same paragraph—

"The question is not whether an Indian title can be barred by adverse possession, or by State statutes of limitation," which intimates that it could not.

Yet in the next breath, the Court takes all power from the plaintiff to enforce its rights, by holding, that the statute of limitations *is a bar* to their enforcement.

MR. JUSTICE THOMPSON says in a matter pertaining to Indians—

"It would be strange *inconsistency* to deny to them the right and power to enforce their rights."

5 Pet., p. 48.

"Against what is known as an Indian title, no statutes of limitation operate."

McGammon vs. Straghtlege, 32 Kan. p. 524.

5 Pet., p. 4. — 1 Paine, p. 457.—1 Dill., pp. 349 and 350. — 5 Wall, pp. 761 and 768.

Again.

If the statute of limitations can be a bar to this action, it makes the laws giving title on twenty years adverse possession, operative and in full force against the Indians. It is merely a round-a-bout way of doing what cannot be done directly.

It was *not* admitted by the plaintiffs, as alleged by the defendant, that immediately after August 31, 1826, "possession *was given* by the Indians."

The admission is, that the Ogden Land Company and their grantees, *have occupied* said premisesr.

The Court will see, that the question of occupancy by the whites, is one of no moment so far as claiming title by adverse possession is concerned. It is also claimed by the plaintiff, that as the premises in question are, (if the title did not pass under the so called treaty of August 31, 1826) a part of the Cattaraugus Reservation, and that under the decisions, (that the occupancy of any part of a reservation by Indians, is an occupancy of the whole,) the Indians have ever been, and still are, *in law*, occupants of said premises.

If this is held to be correct, then the question of statutory limitation does not enter into the case. The fact that the whites were joint occupants, does not militate against the *legal* occupancy of the Indians. It is admitted by defendant that the land in question was a part of the Cattaraugus Reservation, and that the Indians are now, and from time immemorial have been in the occupancy of said reservation.

Opinion of the Court of Appeals, Printed Record, page 43.

The fact, (of which the court will take judicial notice) that the plaintiff is a nation of Indians living upon a Reservation under charge of an Agent of the United States, and that Indians are wards

of the United States Government and are *in law* considered minors who never emerge from their minority, taken in connection with the further fact, (of which the Court will also take judicial notice), that Indian lands are not held in severalty, but in common; that every man, woman and *child* have an *equal interest* in, and are equal owners of, every acre of the land, and that it is impossible to separate the interests of the children in Indian lands from that of the adults; and it being conceded that the statute cannot affect the rights of children; how can it apply to them in this case. Certainly the right of the children to sue has not yet expired, and there are hundreds of them yet under the age of twenty-one.

This act does not *change* the statute of limitations. There is nothing in the law making it applicable to *Indian children* under twenty one-years o age, when it admittedly does not apply to white ones.

It seems to me, that the contention of the defendant, that it *does* so apply, is untenable, for if it does, it takes away the land from the children, while yet minors.

It is a federal question whether State statutes giving title to lands by adverse possession in this, or in any other way, can be made operative *against Indians*.

No title to Indian lands can be acquired by adverse possession or proscription.

Act of Congress of March 30, 1802,
Chap. 13, 2nd Vol. U.S. Laws, p. 460.

§ 2, Sec. 2, Art. 2, U. S. Constitution.
§ 3. Sec. 8, Art. 1, U. S. Constitution.
R. S. of N. Y., § 88, p. 476, (Cothran's Ed.)
5 Pet. p. 4.—U. S. Treaty with plaintiff of Nov. 11, 1794, Vol. 7, U. S. Statutes, pp. 44 and 47.
1 Paine p. 457—65 N. Y. pp. 57 and 66.
1 Dill. pp. 349 and 350.—5 Wall. pp. 761 and 768.
5 Lans. p. 397, — 4 McLean, p. 440, — 5 Wall. pp. 737 and 758, — 3 Dill. p. 418.

IV.

The words,—"within the same time," in Chapter 150 of the Laws of 1845, evidently have reference to rights and property other than those pertaining to the *land* of the Indians. To wit—property owned by the adults alone.

If they *do* apply to the Indians' land, and thus *in any manner* tend to alienate their title, that portion of the act would be unconstitutional and void.

The Indians had a right to take advantage of, and enjoy any rights which Chapter 150 of the Laws of 1845 might *legally* give them, and to test by an appeal to this court, any part of said act which might give the whites any undue advantage over them by reason of its violating their rights under the constitution of the United States.

"The fact that some provision or part of a statute is unconstitutional, does not make the remainder so, if such remainder is independent of, and seperable from the void part, so that one part may operate against the other."

Packet Co. vs. Keokuk, 95 U. S. p. 80.
Unity vs. Burrage, 103 U. S. p. 459.
Penniman's case, 103 U. S. p. 717.
Presser vs. Illinois, 116 U. S. p. 252.

Chapter 150 comes directly under these authorities. The clauses are separate and distinct. The right to sue is an entirety. Had the illegal limitation clause not been inserted in the act, the right to sue would have remained the same, for it is "independent of, and separable from the void part."

"The decision of the highest court of a State, that a statute is in accordance with the *State* constitution, is only conclusive upon the United States Supreme Court when *no federal question* is involved."

Atlantic & Gulf R. R. Co. vs. Georgia, 98 U. S. p. 358.
Dundee Mortgage Co. vs. Parish, 24 Fed. Rep. p. 197.
Gelpcke vs. Dubuque, 1 Wall. (U. S). p. 175.

If upon the hearing of this case upon its merits, this Court should decide that the treaty of August 31, 1826, was *not* a valid treaty, and therefore did not pass the title to said premises, (and that can only be known after the hearing upon its merits is had,) then, if the contention of the defendant is correct, that the State statute of limitations

is not a federal question, and further, that the State courts *alone* can pass upon such act, and that their decision, is *final;* then the decision of this court, the highest in the land, would be nulified and made of no effect by the decision of a *lower* court, the lower court holding that the Indians are debarred from *enforcing* their rights by reason of the State statute of limitations.

This is also a federal question, the plaintiff being Indians, and the limiting clause virtually causing the alienation of their lands.

"State courts are bound to conform their decisions to those of the Supreme Court of the United States on all questions involving the construction of the Federal Constitution."

New Market Bank vs. Butler, 45 N. H. p. 236.
Black vs. Lusk, 69 Ill. p. 70.

V.

Any questions arising under the "treaty" of August 31, 1826, that in any way pertain to, or effect *the land*, are *federal* ones.

It was made, and "held under the *authority of the United States.*"

Treaty of August 31, 1826, Printed Record Marg. page 21.

The acts of 1875 and 1887 both provide for the removal of suits of a civil nature, at law or equity, arising under treaties made under "*the authority*

of the United States." The treaty under consideration was so made.

The State of Massachusetts having once owned the "preemption right," was present by a person it called "Superintendent," but the State of New York had nothing whatever to do with its making. It did not even have an agent present at the time, but the United States appointed a commissioner to attend to it, and he was present, and it was made under *his* directions, and asserts at its very commencement, "*At a treaty held under the authority of the United States.*"

See treaty, Printed Record page 12.

CHIEF JUSTICE MARSHALL says—"A case in law or equity may be truly said to arise under the constitution, or a law of the United States, whenever its correct decision depends on the right construction of either."

Cohens vs. Virginia, 6 Wheat. (U. S.) p. 379.

Tennesee vs. Davis, 100 U. S. p. 257.

New Orleans etc. R. R. Co. vs. Mississippi, 102 U. S. p. 135.

Van Allen vs. Atchison etc. R. R. Co. 1 McCrary U. S. p. 598.

Trafton vs. Monques, 4 Sawy. (U. S.) p. 178.

McFadden vs. Robinson, 22 Fed. Rep. p. 10.

Willard vs. Mueller, 23 Fed. Rep. p. 20.

The correct decision upon the *merits* of the case

at bar, depends *entirely* upon the right construction of the constitution and laws of the United States.

"The fact that other questions arise in the suit, will not prevent its removal."

Mayor etc. of Nashville vs. Cooper, 6 Wall. (U. S.) p. 247.
Connors vs. Scott, 4 Dill. (U. S.) p. 242.
Western Union Tel. Co. vs. National Tel. Co., 19 Fed. Rep. p. 561.

VI.

The defendant also moves this Court to dismiss this case because "it is manifest that such appeal was taken for delay only."

This the plaintiff in error most emphatically denies.

The plaintiff in error feels that it has not received justice at the hands of the State courts, and that it has just grounds for appealing.

The courts themselves have greatly disagreed, the General Term of the Supreme Court holding that the treaty of August 31, 1826, *required* ratification by the Senate to make it valid, but that the Act of Congress of 1846, supplied the defect, while the Court of Appeals held that it did *not* require ratification by the Senate.

The Court of Appeals also held that because the treaty between Massachusetts and New York was ratified, it gave Massachusetts or its grantees, the right to purchase lands of the Indians without any

interference from the United States Government. This the plaintiff thinks is not sustained by the law or the evidence.

If it did, why did Troup, Ogden & Rogers apply to the U. S. Government for a Commissioner, and why did the U. S. Government send one with specific instructions, and why was the treaty immediately sent to the President, and by him to the Senate for ratification.

There can be no question but that all concerned in the transaction deemed ratification necessary including the President of the United States.

Are not the acts of the interested parties at the time, to be taken as construing the intent, meaning and necessary action to be had, of and under the documents they are acting upon, such acts certainly indicate how *they* understood them.

If ratification of *such treaties* was not necessary, why did Gov. Clinton of the State of New York, after the ratification of the Constitution, gather *all* that had been made by the State of New York, and send them to the President, and he send them to the Senate, *and the Senate ratify each and every one of them.*

The reason is obvious. By the adoption of the Constitution each of the original States gave up their original right to purchase lands of the Indians, and agreed to be governed in the future by the U. S. Constitution, and such laws as Congress should pass.

Again,

The counsel's assertion that if the claim of this plaintiff is sustained "the title to immense tracts of land in the original thirteen states would be open to attack upon similar grounds," is evidently made to intimidate this Court.

The assertion however, will not bear investigation, for I think it can be established that all the just and fair treaties made with the Indians, have been ratified.

It is fair to presume, I think, that the treaty of August 31st, 1826, would have been ratified, had it not been bitterly opposed, and had it not shown upon its face an egregious swindle. By its terms, the Indians were to receive $48,216, but it was shown that they had only been paid $43,050, the sum of $5,166 having in a mysterious manner been diverted into some other channel.

A petition to the President, protesting against the treaty, signed by Red Jacket and twenty-six other Chiefs and head men of the Seneca Nation, came into my possession too late to be introduced as testimony, but it gives me the right to state that the ratification of the treaty was bitterly opposed.

The Ogden Land Co. composed of Troup, Ogden Rogers and others, was a powerful and influential company, and after trying for two years to get the treaty ratified and failing, finally succeeded in getting a whitewashing resolution passed. That is all that resolution amounts to, for the Senate had previously ratified just such treaties, and *afterwards* ratified many others of like character.

It is plainly inferable from the resolution itself, that charges of fraud, etc., had been made, else why did the Senate feel called upon to say anything about the terms of the contract. Had there been no charges against it, there would have been no call for such a resolution.

Then again, the words in the resolution, "but merely to disclaim the necessity of an interference by the Senate with the subject matter," evidently had reference to investigating the charges. The Senate did not think it necessary to go into such a "subject matter."

Any other interpretation is antagonistic to the after action of the Senate, for it *did afterwards* ratify many other Indian treaties of like character.

2nd.

Is it any ground for with holding justice from the Indians because Troup, Ogden and Rogers were unscrupulous, and took advantage of their ignorance, and surveyed and sold the lands, (making immense sums of money,) regardless of their inability to get a perfect title to it; or that by reason of the ignorance of the Indians, they have been wronged for a long number of years? Surely not.

The plaintiff firmly believes it has not received justice at the hands of the State Courts, and that it has a good case *upon the merits;* and it has not taken this appeal "for delay only."

The plaintiff therefore submits,

1st,

That *Federal* questions *were* necessarily involved

in the judgment of the State Court, and that a correct decision cannot be rendered upon the *merits* of this case without their determination.

2nd,

That the second motion made by defendant is not sustained by the record, and also that it necessarily involves a discussion of the merits, and the merits cannot be brought up upon motion in this manner.

The plaintiff in error therefore asks, that both motions be dismissed with costs.

JAMES C. STRONG,
Attorney and Counsel for
Plaintiff in error.

Office Supreme Court U. S.
FILED.
JAN 17 1896
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT,

OF THE UNITED STATES,

OCTOBER TERM, 1895.

THE SENECA NATION OF INDIANS,
Plaintiff in Error,

vs.

HARRISON B. CHRISTY,
Defendant in Error.

No. 180.

Brief of James C. Strong, Attorney and Counsel for Plaintiff in Error.

BUFFALO:
W. H. WRIGHT, JR., PRINTER,
18 & 20 ELLICOTT ST.
1896.

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BRIEF AND ARGUMENT

OF PLAINTIFF IN ERROR.

STATEMENT.

This is an action in ejectment arising upon the following facts:

Prior to August 31, 1826, the right of pre-emption of the State of Massachusetts to purchase the land described in the complaint in this action (with

other lands) was conveyed to Robert Morris, and from him by sundry mesne conveyances, vested in Robert Troup, Thomas L. Ogden and Benjamin W. Rogers (commonly known as the "Ogden Land Company"). (Marginal page of record 10 and 24.)

The land described in the complaint in this action was a portion of the Cattaraugus Reservation, and from time immemorial had been in the possession of the Seneca Nation of Indians, (the plaintiff). (M. p. 10.)

That on August 31, 1826, said Troup, Ogden and Rogers made a "treaty" with plaintiff (M. p. 11, and 21 to 26) in and by which they purported to purchase the land in question, (with other lands) from the plaintiff. (M. p. 23 and 24.)

That afterwards through sundry mesne conveyances from said Troup, Ogden and Rogers, all the title possessed by them in the land described in the complaint, under the "treaty" of August 31, 1826, was conveyed to and vested in the defendant. (M. p. 11 and 15.)

That defendant and his grantors have occupied said premises ever since shortly after said "treaty" was made. (M. p. 5.)

That the defendant claims title to the lands in question by title received from Troup, Ogden and Rogers, under and by virtue of the "treaty" of August 31, 1826, (M. p. 11) and by title derived from an adverse possession of over twenty years. (M. p. 5.)

That the consideration mentioned in said "treaty" was $48,216. (M. p. 21.)

That Troup, Ogden and Rogers failed to pay the whole of said consideration, and did only pay the sum of $43,050. (M. p. 13 and 37), leaving a balance of $5,166 unpaid.

That said "treaty" was, on February 24, 1827, transmitted by the President of the United States, to the Senate of the United States.

That the Senate of the United States acted upon it, but refused to ratify the same, and said "treaty" was never ratified by the United States Senate or approved and proclaimed by the President in pursuance of the provisions of the Constitution of the United States. (M. p. 34 to 36.)

HISTORY OF THE "TREATY."

As the principal question to be decided in this case, is the validity or invalidity of the "Treaty" of August 31, 1826, it may be well, before commencing the argument, to give a little history of said "Treaty" as given in a report made by the Commissioner of Indian affairs, to the Secretary of the Interior Department, dated April 15, 1881, said report being an official document now on file in the archives of the United States Government at Washington, D. C.

He says, speaking of the said treaty of 1826:

"It appears that prior to 1826, the preemption "right to the lands embraced in the Morris "purchase, vested in Robert Troup, Thomas L. "Ogden, and Benjamin W. Rogers.

"By an agreement entered into August 31, 1826, "under the sanction of the United States, repre- "sented by Oliver Forward, the State of Massa- "chusetts being represented by Nathaniel Gorham, "between the Seneca Nation of Indians of the first "part, and Robert Troup, Thomas L. Ogden and "Benjamin W. Rogers of the second part: the said "parties of the first part for and in consideration "of the sum of $48,216 agreed to convey to the "parties of the second part the following tracts of "land as indicated in blue on sheet 3, viz:"

(Naming numerous pieces of land, and then says:)

"The parties of the first part also convey to the "parties of the second part by said agreement, "eight square miles, as therein described, out of the "Cattaraugus Reservation.

"The aggregate cession, amounting to about "85,760 acres, at about fifty cents per acre.

"This agreement was transmitted to the Senate "by the President, under date of February 24, "1827, and the same failed of ratification February "29, 1828. (See Senate Journal, 1815–29, pp. "576, 579, 598 and 600.)

"Of the consideration money expressed in the "afore-mentioned agreement, it appears that

"Troup, Ogden and Rogers assigned and trans-
"ferred to the Ontario Bank, to be held in trust
"for the Seneca Nation of Indians, $42,500 of
"stocks of the public debt of the United States,
"bearing interest at the rate of six per cent. per
"annum, being the loan of May 2, 1814, and also
"$550 of the stocks in the same debt, and bearing
"the same rate of interest, being the loan of 1813,
"for which amount $43,050 said Bank on the 21st
"day of April, 1827, issued its declaration of trust.

"This fund appears to have been held by the
"Ontario Bank until 1855.

"By the 3rd section of the Act of Congress ap-
"proved June 27, 1846, (9 Stat. 35.) the Presi-
"dent was authorized to receive from the Ontario
"Bank any stock of the public debt of the United
"States or moneys which said Bank might hold in
"trust for the Seneca Indians.

"In pursuance of this act, the said fund was
"transferred to the United States Treasury by
"warrant dated August 24, 1855.

"By an act approved May 25, 1878, (20 Stat.
"535) authority was granted to cause the Catta-
"raugus Reservation to be re-surveyed in accord-
"ance with the original survey thereof. (1798.)

"On completion in 1878 of the survey authorized
"by this act, the Indians discovered that the lands
"in the eight square miles sold to Troup, Ogden
"and Rogers by the unratified treaty of 1826, were
"all occupied and claimed to be owned by whites,
"and this is the case with all the other tracts sold
"to these parties at the same time.

"This has raised the question of the legality or "validity of the sale of all the tracts sold to "Troup, Ogden and Rogers by said unratified treaty "of 1826.

"The treaty of 1826 having failed of ratification "by the Senate, of course, the Indian title to the "lands in question did not pass.

"I have been unable to find anything to show "why the full amount of the consideration was "not deposited in said Bank."

"Very respectfully,
"Your obedient servant,
"H. PRICE,
"Acting Commissioner."

I.

The plaintiff has a Standing in Court, and a right to bring this action.

Section I of Chapter 150 of the Laws of the State of New York of 1845, provides, that—

"The Seneca Nation residing on the Cattaraugus "and Allegany Reservations in this State, shall be "deemed to hold and possess said Reservations as "a distinct community, and in and by the name of "'The Seneca Nation of Indians' may prosecute "and maintain in all courts of law and equity in "this State, any action, suit or proceedings which "may be necessary or proper to protect the rights "and interests *of the said Indians, and of the*

"*Nation*, in and to the said Reservations, and in "and to the said Reservation called the 'Oil Spring "Reservation,' and every part thereof; *and espec-* "*ially may maintain any action of ejectment to* "*recover the possession of any part of the said* "*Reservations unlawfully withheld from them*, and "any action of trespass, or on the case, for any "injury to the sale of said Reservations, or for cut- "ting down or removing, or converting any timber "or wood growing or being thereon, or any action "of replevin for any timber or wood removed "therefrom, and may maintain any action or suit "as aforesaid for the recovery of any damages for "any injury to the common property or rights of "the said Indians, or for the recovery of any sum "of money, property or effects, due or to become "due, or belonging, or in any way appertaining to "the said Indians in common, *or to the said Sene-* "*ca Nation*."

§ 1' Chap. 150, Laws of N. Y., 1845.

This act has been declared constitutional by the Supreme Court of the United States.

It is admitted by defendant, that the land described in the complaint in this action, was a part of the Cattaraugus Reservation prior to August 31, 1826, so that this action comes directly under the section above quoted of the act of 1845.

Section 449 of the Code of Civil Procedure provides that, "every action must be prosecuted in the name of the real party in interest."

There can be no question but that the "real party in interest" in this case is the "Seneca Nation of Indians," the plaintiff.

It may be claimed by the defendant, that the "Tonawanda Band" of the Senecas, should have been joined as plaintiffs in this action. We think not.

The plaintiff has the right to bring this action, not only for that part of the nation which resides on the Cattaraugus and Allegany Reservations, but for "*the whole nation*," regardless of where they reside.

The courts are bound to recognize as "The Seneca Nation of Indians" those Indians whom the government recognizes as such nation, at the time the action is brought, and the government has recognized those residing on the Cattaraugus and Allegany Reservations, (the plaintiff) as "The Seneca Nation of Indians."

The Court of Appeals of this State, in a case entitled "That portion of the Cayuga Indians residing in Canada, against the State of New York," in its decision filed June 2, 1885, when speaking of separate bands of the same tribe or nation of Indians, say:

"If they have separated from their tribe, it is immaterial, so long as the State recognizes the tribal organization as existing, and deals with it as a Nation, the Courts, and officers of the State must so regard it."

99 N. Y.—p. 235 and 237.

It will be seen therefore that as far as the right, and authority to bring this action is concerned, the plaintiff has a standing in this Court.

Sec. 1, Chapt. 150, Laws of 1845.
Sec. 449 of the Code of Civil Procedure of the State of New York.

II.

The plaintiff being a nation of Indians, the statute of limitations does not apply to, or affect its right to bring this action.

1st. Indians living on reservations, and under charge of an agent of the United States, are, and ever have been since the formation of this government, considered and treated as Wards of the government—as Children, or *Minors* who never emerge from their minority.

The term "minority" as applied to Indians living upon reservations surrounded by civilized people, is absolutely unique; no other minors in the world are like them, or are so situated, and therefore there can be no comparisons. But the government in its humanity has taken them under its especial care, and protected them in the possession of their property, as it protects the children of our own citizens who possess property. They are both protected by law, for the same reasons—their ignorance of our laws relating to property, and their want of experience in its management and protection.

The fact that Indians may maintain actions in the courts, does not place them within the purview of the statutes of limitation.

A minor citizen can maintain an action in the courts, but the law prescribes that he must sue in the name of a guardian "ad litem." Though the guardian "ad litem" however, is but a mere "modus operandi," *the right exists in the minor.*

The act above cited prescribes no guardian "ad litem" for Indians, although minors, unless it may be said that by the act it makes "The Nation" the guardian "ad litem" for the people, for it provides that the people must sue in the name of "The Nation."

In the case in the United States Supreme Court entitled, "The Kansas Indians," reported in the 5 of Wall. 737, the Court on page 758 say:

"It is argued, because the Indians seek the courts "of Kansas, for the preservation of rights, and the "redress of wrongs, sometimes voluntarily, and in "certain specified cases by direction of the Secretary "of the Interior, that they submit themselves to "*all* the laws of the State. But the conduct of In-"dians is not to be measured by the same standard "which we apply to the conduct of other people. "Kansas is not *obliged* to confer any rights upon "them. But because a sound policy may dictate "the wisdom of treating them in some respects, as "she treats her own citizens, and thereby weaning "them from the ancient attachments to their own "customs, *they are none the less a separate people,* "*under the protection of the general government.*"

Again,

The statute of limitations itself provides that it shall not run as against minors, and Indians, in law, are Wards of the government—are minors who *never* attain their majority.

5 Pet. p. 4.

Under the Federal Constitution, the State has no power to pass any act that would directly or indirectly deprive the plaintiff of its lands; and to deprive it of the power to enforce its rights to the possession of its lands, under *any* circumstances, whether a long or a short time has elapsed, would be indirectly depriving it of its lands, in violation of the treaty made with it by the United States November 11, 1794, which guarantees to plaintiff the quiet and peaceable possession of these very lands, "until it shall choose to sell them," and this treaty stipulation is the supreme law of the land, and the State of New York must be governed by it. Therefore, if the plaintiff *has not sold* its lands, (and this action is brought to see whether it has or not) the State has no power to pass any act that will in any manner deprive it of its rights to enforce its "quiet and peaceable possession" of them, and the statutes of limitation if applicable to it, *would* accomplish that result.

The fact, (of which the court will take judicial notice) that the plaintiff is a nation of Indians living upon a Reservation under charge of an Agent of the United States, and that Indians are wards

of the United States Government and are *in law* considered minors who never emerge from their minority, taken in connection with the further fact, (of which the Court will also take judicial notice), that Indian lands are not held in severalty, but in common; that every man, woman and *child* have an *equal interest* in, and are equal owners of, every acre of the land, and that it is impossible to separate the interests of the children in Indian lands from that of the adults; and it being conceded that the statute cannot affect the rights of children, how can it apply to them in this case. Certainly the right of the children to sue has not yet expired, and there are hundreds of them yet under the age of twenty-one.

This act does not *change* the statute of limitations. There is nothing in the law making it applicable to *Indian children* under twenty-one years of age, when it admittedly does not apply to white ones.

It seems to me, that the contention of the defendant, that it *does* so apply, is untenable, for if it does, it takes away the land from the children, while yet minors.

The Treaty of 1794, guarantees to plaintiff the "quiet and peaceable possession" of this very land, and as Mr JUSTICE THOMPSON in 5 Wall, p. 48 (in another matter pertaining to Indians) says, — "It would be strange inconsistency to deny to them the right and power to enforce their rights." The statute of limitations would do this.

5 Wall, p. 48.

Again,

It is in evidence, and undisputed, that the land in question was a part of the Cattaraugus Reservation, (M. P. 23 and 24.) and if the plaintiff has never lost title to it, it is still a part of that Reservation.

It is well settled by the decisions, that the possessions by Indians of *any part* of a Reservation, is possession of *the whole*, and it is admitted (M. P. 11.) that the plaintiff now is, and from time immemorial has been in possession of the Cattaraugus Reservation. That the whites have been *joint* occupants does not oust the Indians.

It then follows as a sequence, that if the title to the land in question *is* still in the plaintiff, and it is still a part of the Cattaraugus Reservation, it is, and ever has been *in the possession* of plaintiff, and therefore, twenty years have not elapsed, so plaintiff would not be debarred from bringing this action by the statutes of limitations even if they did apply, and the question as to whether plaintiff has ever parted with the title of this land, depends entirely upon the validity or invalidity of the "Treaty" of 1826, the very question to be determined in this action.

Again,

It will be seen by an examination of the authorities cited under point III, relating to adverse possession, that the courts have held, that Indians have a right to bring actions to recover the possession of such

lands although the whites have been settled on them more than twenty years, regardless of any statutes of limitation.

Any act which deprives the Indian of his right to enforce possession of his lands, regardless of the lapse of time, indirectly deprives him of his land, in violation of treaty obligations, which the State, by signing and ratifying the Federal Constitution agreed should be the supreme law of the land, by which it pledged itself to be governed, and its sacred faith is pledged to the faithful maintneance of that agreement, which provides in § 2, Art. 6, as follows:

"All treaties made, or which shall be made under "the authority of the United States, shall be the "Supreme law of the land; and the Judges of every "State shall be the bond thereby, anything in the "Constitution or laws of any State to the con- "trary notwithstanding."

§ 2, Art. 6, U. S. Const.

"Against what is known as an Indian title, no statutes of limitation operate."

McGammon vs. Straightlege, 32 Kan., 524. 5 Pet., p. 4; 1 Paine, p 457; 1 Dill., pp. 349, 350; 5 Wall., pp. 761 and 768.

III.

No title to Indian lands can be acquired by adverse possession or proscription.

Adverse possession does not effect the title to lands belonging to minors.

R. S. of N. Y., § 88 p. 476. (Cothran's ed.)

Indians are wards of the government, and under the law, are *minors* who *never* emerge from their minority.

5 Pet. p. 4.

§ 3 of Sec. 8 of Art. 1 of the Federal Constitution gives Congress the exclusive right and power to regulate commerce with Indian tribes or Nations.

After the adoption of the Federal Constitution, none of the States had any right or power to pass any act in its legislature that would abridge or interfere with this clause of the Constitution, neither could any State change the manner of dealing with, or abridge, or in any way interfere with any rights Congress might confer upon Indians in commercial dealings with them; and the regulation of the manner in which they might sell their lands, was one of those rights.

In a treaty made by the United States with the "Six Nations" (of which the plaintiff was one,) dated November 11, 1794, after setting forth the boundary of the lands belonging to the plaintiff, which lands included the lands described in the complaint in this action, the treaty provides as follows:

"Now the United States acknowledge all the "lands within the aforementioned boundaries to be "the property of the Seneca Nation; and the "United States will never claim the same, nor "*disturb* the Seneca Nation, nor their Indian "friends residing thereon and united with them, in "the free use and enjoyment thereof, *but it shall* "*remain theirs until they choose to sell the same* to "the people of the United States, who have the "right to purchase."

M. P. 29 and 30.

It will be seen that under this treaty which was made pursuant to the Constitution, the plaintiff has a vested title in possession to the land described in the complaint in this action, "*until it shall choose to sell the same.*"

It is admitted that the land described in the complaint is a part of the lands described in said treaty of November 11, 1794. (M. P. 29 and 30.)

The State of New York by the adoption of the Federal Constitution, pledged itself not to pass any act in its Legislature that would contravene its provisions, therefore, as a title by adverse possession or proscription would not only "disturb" the Indians in the "quiet and peaceable possession," but actually *deprive* them of the title to their lands, and would abridge and interfere with their treaty rights, and by so doing would violate that provision of the Federal Constitution which gives Congress the exclusive control of Indian lands, and

also the provision of the above mentioned treaty, the Court is bound to hold that any State Act giving title to lands by adverse possession, or proscription, cannot, and does not apply to lands owned by Indians.

"Title by adverse possession cannot be acquired against Indians."

Sparkman vs. Porter 1 Paine, p. 457.

The laws of the State apply only to those under its control, and the Indians, (so far as the disposition of their land is concerned,) are not under the control of the State, but are under the exclusive control of the Federal Government.

The State has no right to levy taxes upon Indian lands, even for highway purposes, and no title would accrue to the purchaser on a sale of their lands for taxes. Much less would the State have a right to *deprive* them of their lands by proscription.

5 Wall, pp. 761 and 768.

A tax deed is invalid "because exemption of "their land from State taxation, being an exemp- "tion prescribed by Federal authority, no legisla- "tion of a State can extend the effect of its laws "for taxation over lands exempted by Federal "authority."

1 Dill, pp. 349 and 350.

"Title by proscription is restricted to such rights "as might have been created by grant. If by law

"no grant of a right could ever be rightfully made, "no presumption of grant can arise from user, and "the right cannot rest in proscription."

5 Lans, p. 397.

"An entry made upon lands inhabited or claimed "by Indians previous to their cession to the "United States, contrary to the acts of Congress "of March 3, 1793, and March 30, 1802, *is void*, "and no rights can be acquired under such entry."

Chum vs. Darnell, 4 McLean 440.

The unreported case of "The Seneca Nation of Indians vs. John Crooks," tried at the Cattaraugus County Supreme Court Circuit in May, 1887, Hon. L. L. LEWIS, Justice presiding, was one of ejectment. The defendant proved that his father and himself had occupied the premises over forty years, and he claimed the land by *adverse possession.* (It was a strip of land off this same Cattaraugus Reservation.)

In this case the learned Judge held:

"That the Indians own their lands, under laws "of the United States, and treaties, which are the "supreme law of the land, and that no State could "take away their title; and hence a State law giv- "ing title to land by twenty years adverse posses- "sion, could not help the defendant."

The Seneca Nation v. Crooks.
Cattaraugus Sup. Ct. Circuit, May, 1887.

In the case, in the U. S. Supreme Court, entitled, "The New York Indians," reported in the 5 Wall, the Court on page 768 says;—

"But the rights of the Indians do not depend on "this, or *any other statute* of a State, but upon "treaties, which are the supreme law of the land; "it is to these treaties we must look to ascertain "the nature of these rights, and the extent of them."

The N. Y. Indians, 5 Wall, pp. 761, 768.

In the case of Mungosa v. Steinbrook, 8 U. S. Circuit, the Court held;

"The laws of the State of Kansas have *no appli-* "*cation* to the mode of *alienation* of lands granted "to the Miami Indians."

3 Dill, p. 418.

In the treaty of November 11, 1794, the United States solemnly guaranteed that the plaintiff should not be "disturbed" in the quiet and peaceable possession and occupancy of the lands described in the complaint in this action.

On pages 760 and 761 of the case reported in the 5 of Wall, the Court say:

"The object of the treaty was to hedge the lands "around with guards and restrictions so as to pre- "serve them for the *permanent* homes of the "Indians."

5 Wall, pp. 737, 760, 761.

The above authorities conclusively settle the question, that no title to Indian lands can be gained by *adverse possession* or proscription.

And they apply with equal force to the statutes of limitation, or *any other* statute which abridges or interferes with the treaty rights of Indians, either by taking them away, or by depriving him of a right or power to enforce them, which is merely an indirect way of taking them.

Act of Congress of Mar. 30, 1802 (chap. 13, 2d vol. U. S. Laws, p. 460).

§ 2 of Sec. 2 of Art. II, of the U.S. Constitution.

§ 3, Sec. 8, Art. 1, of the U. S. Constitution.

R. S. of N. Y., § 88, p. 476, (Cothran's ed.)

5 Pet., p. 4, U. S. treaty with plaintiff, dated Nov. 11, 1794, vol. 7, U. S. Statutes at Large, pp. 44 and 47.

1 Paine, p. 457; 65 N. Y., pp. 57 and 66; 1 Dill., pp. 349 and 350; 5 Wall., pp. 761 and 768.

5 Lans., p. 397; 4 McLean, p. 440; 5 Wall., 737 and 758.

3 Dill., p. 418.

IV.

Lands could not be purchased from Indians except by treaty, entered into and executed in pursuance of the provisions of the United States Constitution.

Chap. 13, vol. 2, U. S. Laws, p. 460.
§ 3 Sec. 8, Art. I., U. S. Constitution.
¶ 2, Sec. 2, Art. 2, U. S. Constitution.

V.

The treaty of August 31, 1826, was made when the act of Congress of March 30, 1802, was in force, and came under its provisions.

Act of Congress of March 30, 1802.

It is claimed by the defendant that the following "proviso" in the act of 1802 makes the ratification by the Senate of a treaty for the purchase of lands from Indians, unnecessary.

The "proviso" is as follows:

"Section 12. Provided, nevertheless, that it shall "be lawful for the Agent or Agents of any State "who may be present at any treaty held with the "Indians under the authority of the United States, "in the presence, and with the approbation of the "Commissioner or Commissioners of the United "States appointed to hold the same, to propose to,

"and adjust with the Indians, the compensation "to be made for their claims to lands within such "State which shall be extinguished by the treaty."

The making of a "treaty" is divided into two essential parts:

1st. The getting the Indians together, agreeing upon the price, writing out, signing and executing the *contract*.

2nd. The advice and consent of the Senate, to the President's approval and proclaiming it. (Ratification.)

Up to the end of the first stage, it is merely a *contract*. On the conclusion of the second stage, it becomes a *treaty*, and not until it becomes a *treaty* does the title to the land pass from the Indians.

This proviso in the Act of 1802 merely *permits*, (the word used is "*may*") an Agent or Agents of a State in which the *lands are located*, to be present and "to propose to, and adjust with the Indians the compensation" etc. New York did *not* have any agent present; Massachusetts did; but the land is "*located*" *in* the State of New York, not in Massachusetts, so I do not see how the authority or power of "an agent" comes into this case, although defendant claims it does, and claims that the agent of Massachusetts was also the agent of the State of New York, but he has no authority for such claim. There is not a word of evidence to sustain it.

The agent is merely to act as an advisor and negotiator for the Indians however, and whatever he does is to be done "in the presence, and with "the approbation of, the Commissioner of the "United States," who is duly appointed by the Government to see that the Indians are justly dealt with, under the standing principle of the Government that the Indians are its wards over whom it must exercise a fatherly care.

It cannot be possible that Congress would pass an act providing that no purchase or grant of lands from Indians shall be of any force or effect, or of any validity whatever, unless made by "treaty" *pursuant to the Constitution*, and that all purchases made otherwise should be absolutely null and void, and then in the same act place a proviso perfectly incongruous and inconsistent with the very object and essence of the Act, as this would be, if the defendant's construction is the correct one.

In case an act contains apparently inconsistent provisions, it is the duty of the Court to give such provisions such construction as will harmonize them with the general tenor and object of the act, if possible.

In this case there seems to be no difficulty. That a State might have an agent present, and he act as negotiator for the Indians in their making a contract for the sale of their lands, is highly consistent with the former provision of the Act, and not at all inconsistent with *any* of its provisions.

But that he should be endowed with full powers to actually *make* the treaty, thus doing away with the use of the President and Senate, is repugnant to, and perfectly irreconcilable with the former provisions of the Act.

The Morris purchase (as it is called) may possibly be cited by the defendant to sustain his construction, but if the Court will examine it, (it can be found on page 601 Vol. 7, U. S. Statutes at large) that his purchase was a mere *contract* with the Indians, to *permit him* to sell their lands, and *every person* who bought the *right* to purchase from Morris, *was obliged to and did* PURCHASE the land from the Indians afterwards by a regular *treaty*. It is called a *contract* in the Statutes.

Again,

The fact that every treaty that has ever been made with the Indians for the *purchase* of their lands since the passage of the Act of 1802, (even including this one of 1826) has been sent to the President and by him to the Senate for ratification, shows to this Court the construction that has been put upon this proviso by the Government itself, and that is the construction claimed for it by the plaintiff.

VI.

The "right of pre-emption" under which this land could be purchased from the Indians was owned by the State of Massachusetts, and was not

private property at the time that State adopted the Federal Constitution, and by its adoption the State bound itself by its provisions, one of which was, that it would not purchase land from the Indians except under such laws and regulations as Congress might enact, governing such purchases, and of course its grantees were governed and bound by its acts.

Grant of King James I, of Nov. 3, 1620.
I. U. S. Charters and Constitutions, pp. 921 to 931.
Grant of King Charles I, Mar 19, 1628.
I. U. S. Charters and Constitutions, pp. 932 to 942.
Declaration of Independence, signed July 4, 1776.
Articles of Confederation signed by Mass. July 9, 1778.
Treaty between N. Y. and Mass. made Dec. 16, 1786.
Ratification and adoption of the U. S. Const. by Mass., on Feb. 6, 1788.

It is claimed by the defendant that the right to purchase the land from the Indians, (the right of pre-emption) was a *private* right, and therefore any purchase under it, could not be called a "treaty," in the sense and meaning of that word as used in § 2 in Sec. 2 of Article 2 of the Constitution of the United States.

This claim is untenable, for the following reasons.

King James the 1st, on November 3, 1620, granted to the "Council established at Plymouth "in County Devon, that part of America between "the 40th and 48th degrees of North latitude, from "sea to sea."

King Charles the 1st, confirmed the above grant made by his father, and on March 19, 1628, made "The Council established at Plymouth a body pol- "itic and corporate, by the name of the Governor "and Company of Massachusetts Bay in New "England."

Charter of the Colony of Mass., 1628, page 1, etc.

Prior to the war of the Revolution, the State of Massachusetts made a claim on the State of New York for its rights under the above grant.

New York resisted the claim, claiming the same land under a grant from Charles the 2nd to the Duke of York. (It is unnecessary to trace this latter title as it does not affect this case).

During the discussion upon the title to this land between the two States, the Revolutionary war arose, and on July 4th, 1776, Massachusetts and New York, with the other thirteen Colonies, signed the Declaration of Independence, and on the 9th of July, 1778, the Articles of Confederation between the thirteen colonies was signed by Massachusetts.

These Articles of Confederation, among other things, provided (in substance) that each of the colonies would abide and be governed by, the laws enacted by "the Congress."

"They also provided (in Article 6) that no State "shall make any "conference, agreement, alliance "or treaty with any King, Prince or *State*," "without the consent of the United States."

On the 16th day of December, 1786, the States of New York and Massachusetts, settled their dispute about the land within the bounds of the New York Colony, by holding a convention at Hartford, Conn., at which a treaty was made between them.

They were at this time separate colonies or States, merely bound together by the Articles of Confederation, but as said Articles provided that no treaty could be made with any King, Prince or *State*, by any of the signers, "without the consent of the United States in Congress assembled," on April 19, 1793, His Excellency, George Clinton, then Governor of New York, sent this treaty to "the Congress" for the purpose of ratification, and it was duly ratified.

"By this treaty between Massachusetts and New "York, Massachusetts relinquished all her claim "to the Government, Sovereignty and Jurisdiction "of the lands and territories so claimed by the "State of New York."

"And the State of New York ceded, granted, re-"leased and confirmed to the commonwealth of "Massachusetts the "right of pre-emption" of the "soil from the native Indians."

The Constitution of the United States was ratified and signed by Massachusetts on February 6, 1788.

This Constitution provided in § 2. in Section 2. of Article 2. that the President, by and with the advice and consent of the Senate, should have the power to make treaties.

This is the *only* power or mode provided by the Constitution for the making of treaties.

In the treaty between Massachusetts and New York it had been provided, that any purchase of the soil from the Indians under the "pre-emption right" must be confirmed by the "General Court" of Massachusetts, but the signing by Massachusetts of the United States Constitution containing the above provision, necessarily ADDED the *constitutional condition* to any purchases of land from the Indians, that took place *after* the signing of the Constitution.

Paragraph 3. of Section 8. of Article 1, of the United States Constitution provides, that Congress shall have power "to regulate commerce with "foreign nations, and among the several states, "*and with the Indian tribes.*"

On July 20, 1790, Congress passed an act, providing that ALL *purchases of land from Indians* MUST be made by treaty, made in pursuance of the provisions of the Constitution.

This act, of course, governed the State of Massachusetts or any of its grantees, in regard to any purchase made by itself or them, of any land from

Indians, for by signing the Constitution it had *bound* itself, and them, to be so governed.

On the 9th day of October, 1792, the State of Massachusetts sold this "right of pre-emption" to purchase a large quantity of land from the Indians (including the land described in the complaint in this action) to Robert Moris.

By sundry mesne conveyances from said Robert Moris, Robert Troup, Thomas L. Ogden and Benjamin W. Rogers became the owners of this "right of pre-emption" and under and by virtue of it, made the treaty of August 31, 1826, and through sundry mesne conveyances, whatever title Troup, Ogden and Rogers had in the land covered by said "treaty," (which included the land described in the complaint,) came to and is possessed by, the defendant herein.

It will therefore be seen from the above historical facts, of which the Court must take Judicial notice, (as they are all matters of public record within this State,) that the State of Massachusetts owned this "right of pre-emption" by its grant from King James the 1st, in 1620, down to and until it sold it to Robert Moris on the 9th day of October, 1792, and while it was owned by the State of Massachusetts, it cannot be said to be *private* property, for any property owned by a State is *public* property.

And it will also be seen, that the Articles of Confederation, the Constitution of the United States, and the Act of Congress of 1790, were all adopted, accepted and agreed to, while *the State owned* this

"right of pre-emption," and therefore, any sale Massachusetts made of it, was governed and bound by whatever Massachusetts had agreed to, relating to it; so that this "right of pre-emption" passed to Robert Moris (who was its *first private* owner,) with the condition of the Constitution, and the law of 1790 and 1802, attached to it.

It will be seen therefore, that the claim of the defendant, that said "right of pre-emption" was a *private* right, and that therefore the Constitution of the United States, and the act of 1790 and 1802, do not apply to it, is untenable.

Again,

Is it really a matter of any consequence whether this "right of pre-emption" was a private or public right?

If public, would it not be governed by, and all purchases of lands *from Indians* under it be subject to the laws of Congress, whether passed when Massachusetts owned it, or when any private individual or individuals owned it?

The act of Congress of 1790, was kept in force by subsequent acts until 1802, when it was made permanent, and was in full force in 1826, when Troup, Ogden and Rogers made their "treaty" which would have undoubtedly been a good and valid purchase, had they fulfilled their part of the contract, and paid *all* the purchase price, (which they failed to do into $5,166.00) *and if said*

"*treaty*," *had been* RATIFIED *by the Senate of the United States*, and proclaimed by the President, pursuant to the provisions of the Constitution.

But it received neither *ratification* by the Senate, nor approval and proclamation by the President, and I know of no law that would exempt such a purchase from such ratification, approval and proclamation, whether made under a public or a private right.

There can be no question, however, but that this "right of pre-emption" *was a public right*, held and owned by the State of Massachusetts at the time it ratified and adopted the Federal Constitution, and pledged itself to conform to, and obey its provisions, and that pledge governed this "right of pre-emption"; and each and every of the grantees from the State of Massachusetts, was bound by that pledge.

In other words, they were bound to purchase the lands they had the right to purchase from Indians, in the manner and under the provisions prescribed by the Federal Constitution, and the acts of Congress pursuant thereto.

VII.

The "treaty" of August 31, 1826, is void, for the further reason that Troup, Ogden and Rogers never paid the purchase price agreed upon, as the condition of the passage of the title. (M. P. 21 and 37 of record.)

The title was to pass to them on their paying $48,216. which they have never done to this day.

They only deposited $43,050 in trust for the Indians, which lacked $5,166 of being the consideration agreed upon. The contract therefore became null and void, by reason of their non-fulfillment of its provisions.

Troup, Ogden and Rogers had no right to the possession of said contract or "treaty" until they had fulfilled its conditions upon their part. (M. P. 21 and 37.)

VIII.

Section 3 of the act of Congress of 1846, which provides for the transfer of this $43,050 from the Ontario Bank into the United States treasury (by reason of the expiration of the Bank's charter) in no way ratified the "treaty" of August 31, 1826, nor did it in any manner affect the title to lands purported to be conveyed by it.

Sec. 3, Act of 1846, approved June 27, 1846.

"A legislative ratification," (were such even *possible* in this case) "of what was previously unlawful must be formed in plain language; it cannot be established by uncertain implications and doubtful inferences."

Cox vs. The Mayor, etc., 103 N. Y., p. 519.

There is not even an insinuation in the Act of 1846 that it was intended to ratify the treaty of 1826.

It is claimed by the defendant that this "treaty" did not need ratification, and if it did, that the following section of the act of Congress approved June 27, 1846, was a sufficient ratification of it, and legalized the purchase of the land covered by it "ab initio." It is as follows:

"Section 3. That the President of the United "States be, and he hereby is, authorized to receive "from the Ontario Bank of New York, any stock "of the public debt of the United States, or moneys "which the said bank may hold in trust for the "said Senecas, whenever the said Indians or other "person whose consent may be necessary, shall in "proper form authorize the transfer, and to cause "the stock to be cancelled, and the amount thereof, "and of any moneys which he may receive, to be "deposited in the Treasury to the credit of said "Indians, upon which amount, interest shall there-"after be paid to them, at the rate of five per centum "per annum until Congress may direct the princi-"pal in this, and the preceding section to be paid "to the Indians."

Vol. 9, Stat. at large p. 35.

This claim of the defendant is untenable.

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Vol. 9, Stat. at large p. 35.

This claim of the defendant is untenable.

It must be conceded that Congress cannot modify, change or override the Constitution of the United States.

The above quoted section of the act of 1846, is an independent section in the act entitled "An "act making appropriations for the current and "contingent expenses of the Indian Department, "and fulfilling treaty stipulations with various In-"dian tribes, for the year ending June 30, 1847," and is the only provision in the whole act that in any manner refers to this money or subject; (all the other provisions merely providing for the payment of annuities under various treaties with various tribes of Indians, etc.) and the act does not, nor does it attempt to repeal, or annul the act of Congress of 1802, (Chapt. 13, 2, Laws U. S. p. 460) which provides that "*all* purchases of land from Indians *must* be made by *treaty* pursuant to the Constitution."

There is no repealing clause in the act of 1846, neither does it mention, or make the slightest reference to the "treaty" of 1826.

The Constitution provides a specific manner of making *all* treaties.

It confers upon the President the *exclusive* power to make them, and restricts him to making only such as are advised by, and consented to, by two-thirds of the senators present at a meeting of the senate.

After the adoption of the Constitution, a discussion arose as to whether the Indian tribes were nations, the dealings with which must be by treaty. It resulted in the passage of the act of 1790, which was kept in force by various continuing acts until the passage of the act of 1802, which was the law governing the purchase of lands from Indians when the "treaty" of 1826 was made.

We have seen under point VII, what the "modus operandi" of making a treaty in pursuance of the provisions of the Constitution was, and surely the provisions of the act of 1846 do not follow the provisions of the Constitution in a single particular; so, unless it repeals, changes or modifies the act of 1802, the "treaty" of 1826 must conform to the provisions of the act of 1802, or must fall under its other provision, that is, be utterly null and void, and of no validity whatever.

It may be claimed by the defendant, that Congress has the right to modify, change or abrogate a treaty. If it has, it has never exercised that right in this case, for it is impossible for this Court to hold, that the act of 1846 modified, changed or abrogated a treaty which is never even mentioned in the act.

After the senate had *acted* upon the "treaty" and refused to ratify it, and the time for its consideration had expired under the rules of the senate, the "contract" could never ripen into a "treaty" but became actually dead, and as if it had never

been made, so it would be exceedingly singular for Congress twenty years afterwards, to pass an act reviving and ratifying it by implication.

Again,

We rely that even if Congress has the right and power to change, modify or abridge a treaty, that power would not imply or include the right or power to *make* one.

There is no provision in the Constitution regulating the modifying, changing or abrogating of a treaty, so Congress is undoubtedly at liberty to exercise its own judgment in regard to it.

But the Constitution *does* provide for the *making* of treaties, and prescribes the *only* manner in which they can be made, and it must be conceded that Congress has no right or power to modify, change, abrogate or over-ride *the Constitution.*

It must also be conceded that if Congress should attempt to ratify any treaty by passing an act for that purpose, or one intended to have that effect, thus taking from the president and the Senate the power granted exclusively to them by the Constitution, the fundamental law of the land; such act would certainly be null and void, and would not ratify the treaty.

The Court will not presume that Congress, in putting that Section in the Act of 1846, meant or attempted to over-ride the Constitution, and certainly there is nothing in the section to cause the Court to assume that position.

The section authorizing the covering the funds in the Ontario Bank into the United States Treasury, is merely a section in an act entitled "An Act making appropriations for the Indian Department," etc., and that Congress attempted or intended to *ratify* a treaty not even mentioned in it, and one the senate had twenty years before refused to ratify, would be a most strained construction.

Is it not much more likely that Congress, on representations made to it by some interested parties, inserted that section in the act, simply to take care of the money, as the charter of the bank was about to expire, and without inquiring, or going into any examination whatever, as to whether the money really did rightfully belong to the Indians or not; and the putting the money into the United States Treasury simply placed it there under the *same conditions* under which it was being held by the Ontario Bank.

If it is *possible* to give two constructions to this section in the act of 1846, (one, that it was intended to *ratify* said "treaty" of 1826, and one, that it was merely intended to place the money in a safe depository,) the Court is bound to give it the construction that will harmonize with the powers of the body that passed the act. The Court will not assume that Congress attempted or intended to *exceed* its Constitutional powers.

Again,

Nothing had been done by either party since the money was first deposited, to change the conditions of the deposit, and the "declaration of trust" or "trust deed" tells what those conditions were.

The "Declaration of trust" provides, that the Bank shall transfer the stocks or funds to the United States, when authorized by the *concurrent authorization* of the Indians given at a "public Council," and Troup, Ogden and Rogers; and in case *such* authorization could not be obtained within two years then the Bank could discharge the trust *by transferring the funds* BACK *to Troup, Ogden and Rogers.*

Declaration of Trust, M. p. 38.

It will be seen that the funds were *never* beyond the control of Troup, Ogden and Rogers after the first two years.

It seems however, that the Bank did not want these funds taken from it in 1846, and applied to the Secretary of the Interior to allow it to keep them until its charter really expired in 1855, which he did, and not until June 23, 1855, was the money taken from the Bank.

It may be easy to see why this money was not disturbed during this twenty years.

The Indians trusted to the whites, and were made to believe it was all right. So far as the

Indians were concerned they knew no better than to let Troup, Ogden and Rogers, and the Bank, do as they chose with the money. They were kept quiet by receiving the interest; but their receiving the interest and keeping quiet, in no way ratified the treaty.

In the case in the Supreme Court of the United States, entitled "The Kansas Indians" on page 758, the Court say:—

"But the conduct of Indians is not to be meas-
"ured by the same standard which we apply to
"other people."

5 Wall, p. 737. 758.

It was for the interest of the Bank to keep the money. It could make one per cent. on it, even loaning it at the usual seven per cent. interest, but using it as Banks use money, it was probably using it at ten, thus making four per cent., and only paying six, and it was in such a shape that the Bank could rely upon it as a permanent fund, not liable to be checked out. It was therefore greatly for its interest to keep it.

To have the permanent use of $43,050 was no small matter for a country Bank in those days.

It was also greatly for the interest of Troup, Ogden and Rogers to let the money lie in the Bank, as long as it would keep the Indians quiet. They evidently hoped and thought that by letting it lie

there, and letting the Indians have the interest upon it indefinitely, the time would come when the "dust of time" would so cover up and hide the enormous villiany that had been practiced in getting this "treaty" from the Indians, that they would never hear from it again, and the loss of interest that was being paid the Indians was *as nothing*, compared to the amount they were receiving. They were making vast fortunes out of the *sale* of the lands, and the interest they were receiving from such sales, and of course kept very quiet.

Thus matters stood for *twenty* years (until 1846) when Troup, Ogden and Rogers or their representatives, thinking time enough has elapsed, evidently again attempted to cover their tracks by having the money placed in the United States Treasury as a resting place, whence it would never trouble them again, and *they* must have procured Section 3, placed in the Act of 1846.

That Troup, Ogden and Rogers, or their representatives did it, is evident from the fact, that the Bank asked to retain it, and from the further fact that the Indians would not have asked it, for it reduced their interest from six to five per cent. (The Act so provides.)

It interfered so much with the interest of the Bank, that immediately on the passage of the act, it applied to the Secretary of the Interior to be allowed to retain the money, which the Secretary permitted them to do.

Of course, Troup, Ogden and Rogers did not wish to take advantage of the clause in the declaration

of trust, authorizing them to receive back the money after two years, for it would have been greatly to their disadvantage.

But things would be changed when the charter of the Bank expired. *Then* the Bank would take advantage of that clause, and would transfer the money back to Troup, Ogden and Rogers, the very thing *they* wished to avoid, so they undoubtedly were the ones who got Section 3, inserted in the Act.

It will be remembered that Section 3, of the Act of 1846 provides, that these funds shall be transferred into the United States Treasury "whenever "the said Indians, *or other persons* whose consent "may be necessary shall in proper form authorize "the transfer."

We have seen that the Indians could not, and did not assented to it, nor did the Bank ask it, so it follows that Troup, Ogden and Rogers, or their representatives *must* have asked for it.

It then follows as a sequence that the funds were only being deposited in the United States Treasury by Troup, Ogden and Rogers, just exactly as they originally deposited them in the Ontario Bank. They had no right or authority to change the conditions.

Troup, Ogden and Rogers were obliged to get such an act passed to save themselves from having to take back the money, and that would at once have aroused the suspicions of the Indians, and

gotten them into trouble; so they must do something to avoid that, and the best way was to get the mnoey into the United States Treasury if they could.

Is it not plainly evident from the above recital of the facts connected with the transaction, and the evident motives actuating thn parties concerned, that the only object intended by that section was to place the funds into some safe depository *more* for the benefit of Troup, Ogden and Rogers than for any one else, and do not all these facts show conclusively, that the claim now made by the defendant, that by giving Troup, Ogden and Rogers this privilege, Congress intended to put any vitality into the old and defunct "treaty" of 1826, and further still, to abrogate and over-ride one of the provisions of the Constitution; the contention certainly is untenable.

Again,

The Indians are in no way to blame for receiving the interest on this $43,050 as they have, or for letting the matter rest as they have until the present time, and the acceptance of this interest cannot be urged against them, as an acceptance or ratification of the "treaty", even were it *possible* to so ratify it.

They were made to believe that they had parted with the title to the lands, and knew no better until a short time before the commencement of this action they were informed to the contrary *by the Secretary of the Interior*, who advised and authorized the bringing of this action.

Neither does the receiving of this interest militate against them as a matter of right and justice, as between themselves and Troup, Ogden and Rogers or their representatives, for they were getting many thousands, while the Indians were getting a few hundreds.

The Ogden Land Company is still in existence, rolling in wealth, and abundantly able to respond in damages to the victims of the unholy greed of Troup, Ogden and Rogers, who were its originators and representatives.

IX.

Ratification of the "treaty" of August 31, 1826, by the Senate of the United States, and its approval and proclamation by the President of the United States, was absolutely necessary to its validity, and as it was *never* ratified, approved or proclaimed by the President, *no title* passed to the lands described in it.

Executive Journals of the Senate, 19th and 20th.

Congress, 1815 to 1829, pp. 495, 496 and 497.

M. P. 34 and 37 of record. Also authorities under points III and VI.

It is claimed by the defendant, that because in the treaties of 1838 and 1842, between the Seneca Nation, and Ogden and Fellows, the number of acres conveyed corresponded with the number of acres in all the reservations, *less* substantially, the number purported to be conveyed to Troup, Ogden and Rogers by the unratified treaty of 1826—that that fact tended to show, that it was considered that the "treaty" of 1826 had passed the title from the Indians to the land described in said "treaty" of 1826.

The authorities hereinbefore cited, seem to have settled the question involved in this claim of the defendant against him.

They emphatically hold, that no treaty *can* be ratified by implication, and certainly if the treaties of 1838 and 1842 did have any such effect, it was by implication only.

But they did not imply a ratification of the treaty of 1826. It is easily seen how it happened.

First.

The Indians had been made to believe that they had sold the land described in the "treaty" of 1826. They had no suspicions in 1838 or 1842 but that the "treaty" of 1826 was a valid one, and so of course they were not going to sell their land over again, and therefore knowing nothing to the contrary they said nothing.

Second.

Troup, Ogden and Rogers had been selling this land under the unratified "treaty" of 1826 for

twelve years, and of course claimed the title, and they having had this unratified "treaty" recorded in the Clerk's Office of the different counties in which the land lay, had the *record* title, and therefore *they* were not going to say anything.

Third.

Ogden and Fellows were getting *all* they paid for, and therefore they had nothing to say about the land described in the "treaty" of 1826.

Nothing is said in either of the treaties of 1838 or 1842 about the "treaty" of 1826.

The confirming and ratifying of these two treaties by the Senate (and if ratification of treaties with Indians was *unnecessary*, why were these ratified?) could not affect any lands NOT embraced in them. These treaties described certain lands by metes and bounds, and it was on the sale of that land *only* that the Senate acted.

How *can* it be construed any other way?

It will be said that the Senecas *intended* to convey *all* their lands in this State by the treaties of 1838 and 1842.

We reply, suppose they did so *intend*, if they did *not* do so, but omitted to include any particular piece or parcel, will it be held that the title to that omitted piece passed by reason of the *intention* only, when the land conveyed was described by *actual metes and bounds?* and it is admitted that the land described in the "treaty" of 1826 is *not* embraced in the treaties of 1838 and 1842.

Would the ratification of said treaties which confirmed and passed the title to the land described in them, confirm and pass title to land *not* described in them?

The answer is undoubtedly, *No*, and if that is the correct answer, then this claim of the defendant is also untenable.

A treaty cannot be ratified by implication.

"A legislative ratification of what was previ-
"ously unlawful must be formed in plain language;
"it cannot be established by uncertain implications
"and doubtful inferences."

Cox vs. The Mayor, etc. 103 N. Y. 519.

"A reservation of specific lands to the use of an
"Indian tribe by treaty, confirms the original title;
"and the title so confirmed will prevail over any
"other rights derived from the government."

Gaines vs. Nicholson 9, How, p. 356.

"A statute granting lands to certain Indians,
"and prescribing a specific mode in which they
"may sell, forbids by implication, a sale *in any*
"*other mode.*"

Smith vs. Stevens 10, Wall, 321.

A treaty, and the constitution under which it is made, must be construed together. They are the fundamental law of the land.

It will therefore be seen that under the decisions, Indians cannot give title to their lands except as prescribed, and the title does not pass, unless the treaty is ratified *as prescribed*. It is merely a contract prior to ratification, and title to Indians land cannot be had by contract. It must be by "treaty." Ratification is an essential element in the conveyance, and no where is it provided that a treaty can be *ratified* by *implication*.

Considerable reliance is placed by the defendant upon the Resolution passed by the Senate a few days after its refusal to ratify the said "treaty".

It was as follows:

"*Resolved*, That by the refusal of the Senate to "ratify the treaty with the Seneca Indians, it is "not intended to express any disapprobation of the "terms of the *contract* entered into by the individ- "uals who are parties to that *contract*, but merely "to disclaim the necessity of an interference by the "Senate with the subject matter."

The defendant claims that the words "subject matter" referred to the purchase of the land from the Indians.

The plaintiff claims that those words refer to the charges of corruption that had been made against the individuals concerned in the transaction.

There is nothing in the evidence from which this Court can determine which of these claims is the correct one, and therefore it must be governed by

the history of similar cases that had been before the Senate, and from the circumstances surrounding this one.

When this "treaty" first came before the Senate, (sent there by the President, accompanied by a message asking for the advice and consent of the Senate) it came, as dozens of other treaties for the purchase of lands from Indians had come prior to that time.

The President sent it to the Senate on the 26th of February, 1827, and it was afterwards referred to the committee on Indian Affairs, and ordered to be printed.

On February 29, 1828, (after it had been before the Senate *one year and three days*) it came up on a resolution to advise and consent to its ratification and the resolution was decided in the *negative*.

A little over a month after that, this "whitewashing" resolution was introduced, and on the *second attempt* to pass it, it succeeded in being passed.

It has been held by the Court of Appeals of this State that "Courts will take notice of whatever ought to be generally known within the limits of their jurisdiction; for instance the history of the "Six Nations" of Indians, as a part of the history of the State."

Howard v. Moat, 64 N. Y., p. 262, (af'g 2 Hun, 475).

People v. Snyder, 41 N. Y., p. 397, (af'g 51 Barb. 589).

Under the above decisions of the highest Court in this State, the plaintiff claims he is at liberty to state what took place concerning this "treaty" so far as such statements refer to matters that are of public record.

It is of public record, that after this "treaty" of 1826 was made, very many of the Chiefs of the Senecas, with Red Jacket (who was the acknowledged leader of three quarters of the nation) at their head, remonstrated against the ratification of this "treaty", and sent such a remonstrance to Washington and had it placed upon record, so that the attention of the Senate would be called to it.

This remonstrance charged the individuals connected with the matter, with great and gross frauds, and with bribery. Whether the charges were true or false the fact remains, that for some cause or other, *the Senate* delayed action upon the treaty for over a year, very much out of the usual custom in such cases, and finally *refused to ratify it.*

It will be seen by reference to (M. p. 34 and 35,) that friends of the Indians and the friends of Troup, Ogden and Rogers, were equally divided in the Senate, and as this remonstrance had been sent in, and these charges made, is it not most probable that some discussion had been had over the matter, and that there were some in favor of an *investigation*, and some were not.

Then again, it was such an unusual thing for the Senate to refuse to ratify a treaty made with the Indians, that that fact alone creates a deep suspicion that something must have been radically

wrong in its making, and that Troup, Ogden and Rogers, and their friends, were very anxious to lift this suspicion.

Then again, it will be seen on an examination of Vol. 7, of the U. S. Statutes at large, that *since* the "treaty" of August 31, 1826, was presented to the Senate, ONE HUNDRED AND THIRTY of the same kind of treaties made with Indians HAVE BEEN RATIFIED by the Senate.

Is not this fact alone almost proof positive that the Senate, when it used the words "subject matter" in that resolution, did not mean or have any reference to the "subject matter" of the purchase of lands from Indians.

Is it not much more likely that those words had reference to the "subject matter" of an *investigation of the charges* which had been rung in their ears for about a year, for it seems from the public records of the War Department (the Indians were under the care of the War Department at that time) that on May 9, 1828, within about two months after the refusal of the Senate to ratify the "treaty," *an investigation of said charges was ordered.*

Then again, is it likely that the Senate used those words "subject matter" as referring to the purchase of lands from Indians, when the Act of 1802 was in full force and effect.

We ask, why should the Senate "disclaim the necessity of an interference of the Senate with the 'subject matter' of this purchase of Indian lands, when it had deemed it necessary to interfere and

ratify dozens (I have not looked up the exact number) of the same kind of treaty purchases *prior* to that time, and *one hundred and thirty* right along afterwards.

It may perhaps be immaterial to ascertain just what those words did refer to, when it is almost absolutely certain that they *did not* refer to the purchase of land from Indians.

The Senate by afterwards ratifying the one hundred and thirty just such treaty purchases of land from Indians, gives its own construction of those words; or in other words, certainly construes them as before stated, as NOT in any manner referring to the purchase of land from the Indians.

It was a mere "whitewashing" resolution.

Prior to the adoption of the Federal Constitution, each State dealt with the Indians within its borders in accordance with the acts of its own legislature; but even then, no valid purchase of land could be made from them, unless the purchase was approved by the Government which exercised governmental powers over the country in which the land was situated. From the first settlement of this country the approval of the proper government has been *absolutely necessary* to the validity of any purchase of land from Indians.

"All conveyances from Indians of their aboriginal title, in the time of the Colony or Province of Massachusetts, without the license or approbation of the General Court were void."

Lynn vs. Mahant 113 Mass. 433, 449.
Same doctrine in 45 Miss. 376.

On the 15th day of November, 1777, the "Articles of Confederation" between the thirteen original States was agreed to, and on July 9, 1778, were adopted.

These "Articles" yielded the *exclusive* right to make treaties to "The Congress of the United States of America."

On the 6th day of February, 1788, Massachusetts ratified and adopted the Federal Constitution, and on the 26th day of July, 1788, the State of New York also adopted it, by which act, both States of course, pledged themselves to a faithful obedience of its provisions.

Clause 1, of Section 10, of Article 1, of said Constitution provides, that "No State shall enter into any treaty" etc.

Clause 3, Section 8, Article 1, of said Constitution provides, that "Congress shall have power" "to regulate commerce with foreign nations, and among the several States, AND WITH THE INDIAN TRIBES."

Clause 2, Section 2, Article 2, of said Constitution provides, that "The President" "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

Two years afterwards, on July 22, 1790, Congress enacted a law which provided that "No sale

of lands made by any Indians, or any nation or tribe of Indians, within the United States, should be valid to any person or persons, or to any State, whether having the right of pre-emption to such lands or not, unless the same should be made and duly executed at some public *treaty* held under the authority of the United States."

This act was to be in force for the term of two years.

Chapt. 33, 2 Laws U. S. p. 122, 123.

It is claimed by the defendant, that because in a subsequent act, the words, "or to any State," were omitted, it rendered the ratification of this treaty unnecessary. He seems to forget that this treaty was not between the Indians and the State, but conveyed the land (if valid) directly to *private individuals*, so the omission of those words has no bearing on this case.

On March 1, 1793, Congress passed another act in which it was provided that "No purchase or grant of lands or of any title or claim thereto from any Indians, or nation or tribe of Indians, within the bounds of the United States, (this is not limited to the "Territories" as claimed by defendant, but includes the *States* as well as the Territories) shall be of any validity in law or equity, unless the same is made at a *treaty* or convention entered into *pursuant to the Constitution.*

§ 8, Chap. 19, 2. Laws U. S. p. 360.

On April 19, 1793, immediately after the passage of the act next above cited, His Excellency George Clinton, then Governor of the State of New York, transmitted to Hon. Thomas Jefferson, then Secretary of State of the United States, an exemplification of the treaty of December 16, 1786, between the States of New York and Massachusetts, *and of* ALL *the different treaties entered into by the State of New York with the various nations or tribes of Indians within its borders*, subsequent to the war of the revolution, FOR RATIFICATION, in pursuance to the provisions of the Federal Constitution.

L. U. S. p. 315, (Colvin's Ed.)

Why did Gov. Clinton do this, if unnecessary, and why did the Senate *ratify them all* if an "interference by the Senate with the *subject matter*," was unnecessary?

By the act of 1796, and also the act of 1799, said act of 1793 was re-enacted and continued in force until on March 30, 1802, it was again re-enacted without limitation.

Chap. 13 L. U. S. p. 460.

Thus the law stood at the time of the making of the "treaty" of August 31, 1826, under which the defendant claims title.

It will be seen therefore, that no title passed from the Indians, nor did the defendant obtain any, unless it was obtained by a treaty made and entered into in pursuance to the provisions of the Federal Constitution, and act of 1802.

It is seen from the foregoing, that the purchase of lands from Indians was placed by the act of 1802 in the same category as treaties with foreign nations, and that the President of the United States is the only power authorized to make treaties, and he can only make them "by and with the advice and consent of the Senate, provided two-thirds of the senators present concur."

Such advice and consent of the Senate, and the approval and proclamation by the President is called the *ratification* of the treaty; and in this discussion the term *ratification* is used to express all those acts.

The getting the Indians together—the appointment of a Commissioner by the United States—the appointment of one also by the State of Massachusetts—the writing out and signing the conditions of the agreement, are all preliminary, and are all done with the understanding that before such agreement or contract can become valid or binding, or in any manner disturb the title of the Indians, such contract must become a "*treaty*" by being *ratified*.

Unless it does receive such ratification, the law says it shall be utterly null and void, and of no binding force or effect.

It follows as a sequence, that if such a contract or "treaty" *is* utterly null and void and of *no* validity until *ratified*, *no title* to the lands described in it, could pass from the Indians, until

such ratification, regardless of how much money might have been advanced upon it; for, as every one is supposed to know the law, such a "treaty" would be made, and the money advanced with the distinct understanding that the whole thing would be invalid, and of no binding force or effect upon either party, if it failed of ratification, and it is evident from the actions of Troup, Ogden and Rogers, that *they* so understood it, for it is in evidence (M. P. 32,) that they immediately caused the said contract or "treaty" to be sent to the President of the United States for presentation by him to the Senate, and also placed a portion of the consideration money in the Ontario Bank, subject to its being *returned to them* at the expiration of two years, (M. P. 38.) They immediately sent it to the President for him to transmit to the Senate for *ratification*. Of course, they could have had no other object, so there can be no claim that defendant's grantors did not well know that it was *necessary* to have said "treaty" ratified.

We may be asked in this connection, then why did Troup, Ogden and Rogers go on and sell the lands after the "treaty" had failed of ratification, and they knew no title had passed to them?

The answer is this: Troup, Ogden and Rogers' and the Ogden Land Company to which they belonged, were bold speculators, and they well knew the Indians were so ignorant that they would not know but that the matter was all right as they told them it was. (As an instance of their presuming upon the ignorance of the Indians note their depositing in

the Bank only $43,050 when they had agreed as a consideration of the purchase (and it was so stated in the "treaty") to pay $48,216 (being $5,166 less than the amount,) knowing full well that the Indians would not know whether the sum they were receiving, was the interest on $43,050 or $48,216.

They also knew that not one man in a thousand who might purchase land of them would ever know whether the "treaty" had been *ratified* or not, but would consider its being recorded in the County as sufficient; and they evidently determined to take the chances and act as if the "treaty" had been ratified, for by so doing they, and each of them could (and did) make a fortune.

They therefore went boldly on, surveyed the lands into lots, and commenced selling; keeping the Indians quiet by telling them they had sold the land (which they supposed and believed to be so;) and by letting them draw the interest all the while on the $43,050 they had little difficulty in convincing them that they had parted with the title; they therefore knew they were assuming small chances of detection, and could lose nothing, for they were getting over a million of dollars for what they had only paid $43,050, and were receiving the interest on this vast sum, while only losing the interest on the $43,050 so they could well afford to take the chances, and they took them.

But to return to the question of ratification.

The first treaty with Indians, ratified under the Constitution, was one with the Cherokee Nation, ratified in February, 1791. This was the first treaty made with the Indians after all the thirteen States had been received into the Union, as Vermount was not received until February 19, 1791, although she had ratified the Constitution on January 10, 1789.

Every treaty made with Indians from that day to this, except this one, and one other (which also failed of ratification) has been ratified in accordance with the provisions of the Constitution, and has been published in the public laws of the United States, but a thorough search of these published laws fails to find any publication of the "treaty" of August 31, 1826.

Again.

An examination into the history of this "treaty" shows, that on the application of the parties interested, the United States Government, and the State of Massachusetts, appointed commissioners to be present, in the usual manner.

On August 31, 1826, they met the Indians and concluded the agreement of that date. By it, Troup, Ogden and Rogers agreed to pay the Indians $48,216, as the consideration for title to about 85,760 acres of land. This is the consideration mentioned in the "treaty," and it was to be paid "at or immediately before the ensealing and delivery of these presents."

On the the 21st of April, 1827, Troup, Ogden and Rogers deposited in the Ontario Bank at Canandaigua, N. Y., $43,050, for which the Bank gave its "declaration of Trust," $5,166 less than the Indians had agreed to sell the land for.

The "declaration of trust" provided, that on a concurrent authorization of the Indians given in "public counsel" and Troup, Ogden and Rogers, the Bank could transfer said sum over to the United States, and if no *such* concurrent authorization was given within two years, the Bank was then authorized to transfer it *back* to Troup, Ogden and Rogers. (M. p. 37.)

In this "declaration of trust" the parties themselves call this same agreement a "*Contract*" NOT A "TREATY".

As before stated, this "treaty" or contract was sent on to the President of the United States, and on February 26, 1827, the President transmitted it to the Senate, "for its advice and consent." (M. p. 34.)

The subject was brought up in the senate several times for discussion, and on February 29, 1828, (over a year after it had been sent to the senate) a motion "That the senate advise and consent to the ratification of the treaty, made at the Council House at Buffalo Creek the 31st day of August, 1826, with the Seneca tribe of Indians, as soon as the President shall be satisfied that the purchase money has been paid, agreeably to the provisions of the treaty," was voted upon and decided in the *negative*.

Senate Journal 1815 to 1829, pp. 576, 579, 598, 600. (M. p. 34 to 37.)

Thus it will be seen, that said "treaty" *failed of ratification*, and under and by virtue of the act of Congress of March 30, 1802, which was in force at the time it was made, the purchase of land purporting to be made under it, became absolutely null and void, and of no validity; and *no* title to the land passed from the Indians by reason of it, any more than if it had never been made.

X.

Said "treaty" of August 31, 1826, was *never* ratified by the Senate of the United States, nor approved, or proclaimed by the President of the United States.

See proceedings of the U. S. Senate, (M. p. 34 to 37.)

XI.

The burden of proof in this case rests upon the defendant. It devolves upon him to absolutely prove his title, or plaintiff must recover.

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption title in himself from the fact of previous possession or ownership."

U. S. Statutes at Large, vol. 5, Sec. 22, p. 733.

The plaintiff therefore submits:

1st. That it has a standing in court, and a right to bring this action.

2nd. That the Statute of Limitations does not apply to this plaintiff.

3rd. That no title can be obtained to lands belonging to Indians, by adverse possession or proscription.

4th. That to pass title to the lands described in the "treaty" of August 31, 1826, it required ratification by the United States Senate, and approval and proclamation by the President.

5th. That a treaty cannot be ratified by implication, and therefore the act of 1846 did not ratify this one.

6th. That said "treaty" was *never* ratified by the United States Senate, or approved or proclaimed by the President of the United States, in pursuance of the provisions of the Constitution of the United States.

7th. That the title to the lands described in the complaint in this action still remains in the plaintiff.

8th. That the plaintiff is entitled to judgment, with costs.

JAMES C. STRONG,
Attorney and Counsel for Plaintiff in Error,
Los Gatos, Santa Clara Co.,
California.

Supreme Court, U. S.
FILED.
NOV 29 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, 1895

THE SENECA NATION OF INDIANS,
Plaintiff in Error,
vs.
HARRISON B. CHRISTY,
Defendant in Error.

No. ~~169~~ 180.

Brief of Norris Morey, Attorney and Counsel for Defendant in Error.

BUFFALO:
W. H. WRIGHT, JR., PRINTER,
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1895.

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, 1894.

THE SENECA NATION OF INDIANS, *Plaintiff in Error*, vs. HARRISON B. CHRISTY, *Defendant in Error.*	No. 469.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

Upon motion to dismiss the writ of error, and to affirm the judgment below.

The cause was brought into this court by a writ of error to the judges of the Supreme Court of the State of New York, as "being possessed of the record and proceedings upon a remittitur from the Court of Appeals of the State of New York." (Writ of error, Printed Record, p. 39.)

The motion to dismiss the appeal is made upon the jurisdictional ground that no federal question was necessarily involved in the judgment of the State Court.

STATEMENT OF THE CASE.

The plaintiff in error, the Seneca Nation of Indians, is that portion of the Seneca Nation residing on what are known as the Cattaraugus and Allegany Reservations of the State of New York. By the act of the Legislature of New York, Chapter 150, Laws of 1845, those Indians were constituted a distinct community and authorized to maintain actions in the courts of the states "in the same manner and *within the same time as if brought by citizens of this State in relation to their private individual property and rights.*" This is the only act enabling "The Seneca Nation of Indians" to maintain an action in the courts of the State of New York.

See Court of Appeals opinion, Printed Record, marginal page 111.

Strong vs. *Waterman*, 11 Paige Rep. (N. Y.) 607.

The said Seneca Nation of Indians held a treaty and entered into a contract with Robert Troup, T. L. Ogden and B. W. Rogers, representing the Ogden Land Company, on August 31st, 1826; by said contract the said Seneca Nation sold and conveyed to said Troup, Ogden and Rogers sundry large tracts of land situate in different counties in western New York, amounting in all to about seventy-seven thousand (77,000) acres. (Printed Record, pp. 12-15.) The said treaty was attended by Nathaniel Gorham, representing the Commonwealth of Massachusetts, and Oliver Forward, Commissioner for the United States. The lands so conveyed are a part of the lands, the title to which, prior to 1786, was in controversy between the States

of Massachusetts and New York. By the Treaty of Cession between those states, dated Dec. 16, 1786, the rights of sovereignty were conceded to the State of New York, and the right of pre-emption of the soil from the Indians was conceded to the State of Massachusetts. (Treaty of Cession between N. Y. and Mass. Printed Record pp. 10, 11.)

The claim in behalf of plaintiff in error was that this conveyance was wholly void, for the reason that it was not formally ratified by the United States Senate, and that such ratification was refused by the 12th section of the act of Congress passed March 30, 1802, entitled "An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers."

This action was brought as a test suit to recover possession of a farm of 100 acres embraced within the lands sold and transferred by such treaty or conveyance. (Complaint p. 2). The answer sets up three defenses.

1. A general denial.
2. The Statute of Limitations.
3. That the plaintiff in error had not the legal right and capacity to maintain such an action. (Printed Record, page 3).

The case was tried upon an agreed statement of facts, (pp. 6–9), and documentary proofs. (pp. 9–24).

I.

The conveyance or treaty bears date August 31, 1826. It was admitted that soon thereafter, and prior to 1832, full and exclusive possession was given by the Indians to Troup, Ogden and Rogers under such conveyance, and that the defendant in error and his grantors have ever since been in possession of the premises, holding and claiming title thereto, exclusive of any other right, under such conveyance. (Marginal pp. 12, 15–16, 28).

It was also conceded that the right of extinguishing the Indian title, which is the equivalent to the fee of the land, had become vested in Troup, Ogden and Rogers previous to August 31, 1826. (Printed Record p. 10).

The Statute of Limitations was read in evidence, as follows;

Sec. 5. "No action for the recovery of any lands, tenements and hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of the action." (Printed Record, Marginal page 30).

The statute authorizing the Seneca Nation of Indians, to bring an action in the courts of the State of New York, to wit: Laws of 1845, Chapter 150, has already been quoted from, in the statement of facts. It thus appears that the same act which enabled them to come

into the courts of the State of New York with this action, also imposed upon them the same limitation of time in which they should be authorized to maintain such actions, as the law of the State imposed upon its citizens. The action was therefore directly barred by the 20 years Statute of Limitations, and so it is held in the opinion of the Court of last resort of the State. (Printed Record, p. 57.)

The meaning of the State Statute declared by the highest court of the State is conclusive upon this court.

Randall vs. *Brigham*, 74 U. S., 523. 41
Morley vs. *L. S. & M. S. R. R. Co.*, 146 U. S., 162.
Bauserman vs. *Blunt*, 147 U. S., 548.

II.

To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively that the decision of a federal question was necessary for the determination of the case, or, in other words, that the judgment as rendered could not have been given without deciding a federal question.

Marrow vs. *Brinky*, 129 U. S., 178.
Eustis vs. *Bolles*, 150 U. S., 361.
Klinger vs. *Missouri*, 80 U. S., 257.
Brooks vs. *Missouri*, 124 U. S., 394.
State of Connecticut vs. *Woodruff*, 153 U. S., 689, 9.

The right and time of suit under a state statute, are questions for the determination of the state courts.

De Saussere vs. *Gaullard*, 127 U. S., 216.

Where one of the points decided in the Supreme Court of the State against the plaintiff in error would be a sufficient ground for the jurisdiction of this court, yet if the decree is also based upon another and distinct ground over which this court has no jurisdiction, as the Statute of Limitations of the state, the decree is beyond the revisory power of this court.

Johnson vs. *Risk*, 137 U. S., 300.

The Statute of Limitations of the State of Tennessee was involved in the case of

Rector vs. *Ashley*, 6th Wallace, 142.

But in this Rector case it appeared that the Statute of Limitations had not been pleaded, or relied upon in the State court.

In the case at bar it was pleaded and proved, and held a bar by the court of last resort of the State of New York.

The contention of plaintiff's counsel that the plaintiff, because it is a part of a tribe of Indians, cannot be bound by State laws or the judgments of State courts, is conclusively answered by the facts already referred to, to wit, that the plaintiff has brought this action in a State court by virtue of the State enabling act of 1845 above referred to, and that that statute by its terms imposes upon all such actions the limitation of time prescribed by the State Statute of Limitations.

The application of the Statute of Limitations by the State court is final in this court.

Harpending vs. *Dutch Church*, &c., 16 Peters 455, 493.

It is submitted, therefore, that this is clearly a case in which a writ of error will not lie from this court to review the judgment of a State court, and that the motion to dismiss the appeal should be granted.

III.

If any doubt be entertained as to whether this court has jurisdiction of the appeal, the judgment should be affirmed, upon the ground, that, upon the admitted facts appearing in the Record, the action cannot be maintained under the rules of law established by former adjudications of this court; and that it is manifest that the writ was taken for delay only, and that the question upon which jurisdiction is claimed does not need further argument.

1. It has been long since settled by the decisions of this Court, that the absolute title in fee, to the soil of all Indian lands, upon discovery, followed by possession, vested in the sovereign, by whose subjects such lands were discovered, and that such title was subject only to the Indian right of occupancy; and that such title as to all Indian lands within the thirteen original states vested at the close of the war of the Revolution in the Governments of those states respectively.

Johnson vs. *McIntosh*, 8 Wheaton, 543.
Mitchell vs. *U. S.*, 9 Peters, 711, 745–8
Fletcher vs. *Peck*, 6 Crauch, 142.
U. S. vs. *Kagama*, 118 U. S., 375.
Harcourt vs. *Gaillard*, 12 Wheaton, 523, 6.

It was a conceded fact in this case that the right of extinguishing the Indian title, which is the equivalent

to the title in fee of the Indian lands, had become vested in Troup, Ogden and Rogers previous to August 31st, 1826. (Printed Record p. 10, p. 6.)

It was also conceded that soon after the conveyance of August 31st, 1826, and prior to 1832, full and exclusive possession was given by the Indians to Troup, Ogden and Rogers under such conveyance, and that the defendant in error, and his grantors, have ever since been in possession of the premises, holding and claiming title thereto exclusive of any other right under such conveyance. (Marginal pp. 12, 15-16, 28.)

The title of the Indians to the soil is founded upon simple occupancy, and they have no power to dispose of their right of possession except to the sovereign, or one who has acquired from the sovereign the white man's title, which includes the right of preemption. "The possession when abandoned by the Indians, attaches itself to the fee without further grant."

U. S. vs. *Cook*, 19 Wallace, 591.
Johnson vs. *McIntosh*, 8 Wheaton, 543.
Bucher vs. *Wetherbee*, 95 U. S., 517.
Strong vs. *Waterman*, 11 Paige, 607.
Howard vs. *Moot*, 64 N. Y., 270.
3 Kent's Commentaries, 79, 80.

And as above stated, the fact is admitted in the record, that the Indians surrendered possession of the lands in question to the persons who held the fee and had the right of preemption, to wit, to the grantors of defendant in error.

2. If there had been any question as to whether any affirmative act was required on the part of the

United States Government to give validity to this conveyance of August 31st, 1826, by the Seneca Nation, followed by the voluntary surrender of the lands to the purchasers, that question was settled by Section 3 of Chapter 34, of the Laws of Congress of 1846, approved June 26, 1846, by which the government of the United States received in trust for the Seneca Nation the consideration which was paid for this conveyance. (Printed Record, marginal p. 29, 37-41.)

This was a full recognition and ratification, by an act of Congress, of the purchase from the plaintiff by the grantors of the defendant, of the lands in question, made 21 years after the conveyance had been executed, and the lands surrendered by the Indians. The facts in reference thereto are among the stipulated facts in the case. (Marginal p. 13.) The Government has ever since that Act of Congress paid the annual interest on said sum to the Seneca Nation.

3. The contention of plaintiff's counsel that the approval of the United States Government was requisite under its constitutional authority "to regulate commerce with Indian tribes," is fully satisfied by this act of Congress of 1845, which was adopted by both houses of Congress, and approved by the President; and it becomes wholly immaterial whether the plaintiff's counsel is right in his contention, that the Act of 1802 was not complied with.

The Indian Intercourse Act of 1802 *was* complied with in the making of this treaty and conveyance of 1826, according to its real intent and meaning. This question is discussed very fully and ably in the opinion of Judge Andrews in the New York Court of Appeals, and reference is made thereto. (Printed Record pp. 49–56).

This action was begun on the 13th day of October, 1885, more than 59 years after the grant contained in the conveyance or treaty of 1826 had been executed, and much more than 50 years after the property included in that conveyance had all been surrendered to the grantees. The title to the large body of improved lands, to wit–about 77,000 acres in Western New York, called in question by this action, has remained in suspense now for over 10 years. If this ancient title can be called in question upon the grounds upon which this action has been brought, then the title to immense tracts of lands in the original thirteen states, which for more than half a century have been improved and occupied with farms, villages and cities, relying upon titles acquired in a similar manner, would be open to attack upon similar grounds.

FINALLY.

It is therefore submitted that *the judgment of the State Court should be affirmed*, to the end that the title to the lands described in the conveyance of August 31st, 1826, brought in question by this action, shall be finally quieted by the judgment of this court.

The defendant in error has been compelled under the rule to print the Record at his own expense to enable him to bring on this motion.

The costs of the motion, including the expense of printing, and the clerk's fee for supervising, should therefore be awarded to him.

NORRIS MOREY,
Attorney and Counsel
For Defendant in Error.

Office Supreme Court U.
FILED.
MAR 21 1896
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

Of the UNITED STATES.

OCTOBER TERM, 1895.

THE SENECA NATION OF INDIANS,
Plaintiff in Error.
vs.
HARRISON B. CHRISTY,
Defendant in Error.
No. 180.

Brief of Norris Morey, Attorney and Counsel for Defendant in Error.

Press of Spendelow Printing Co., 119 Franklin St.,
Buffalo, N. Y.

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SUPREME COURT OF THE UNITED STATES.

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Plaintiff in Error.

vs.

HARRISON B. CHRISTY,
Defendant in Error.

Brief and Argument for Defendant in Error.

The cause was brought into this court by writ of error to the judges of the Supreme Court of the State of New York, the judgment of the Supreme Court having been previously affirmed by the Court of Appeals of New York. A motion to dismiss the writ of error has been heretofore made, but decision was reserved until after argument upon the merits.

STATEMENT OF THE CASE.

The action is in ejectment to recover possession of one hundred acres of land situated in the Town of Brant, County of Erie, State of New York. The premises are described in the complaint "as being Lot No. 25 in the tract of land commonly known as 'being the three thousand eight hundred and forty acre tract' taken from the Cattaraugus Indian Reservation."

The complaint also demands judgment for Two Thousand Dollars damages for withholding the premises.

The answer contains a general denial, a plea of the Statute of Limitations, and that the plaintiff has not the legal right or capacity to maintain the action.

Transcript of Record, pp. 2 & 3.

The case was tried upon facts stipulated by the attorneys and upon documentary evidence. The premises in question are part of the large tract of land in the western part of the State of New York, the title to which was in controversy between the States of Massachusetts and New York prior to the adoption of the Federal Constitution. The controversy was settled by an agreement of cession between Massachusetts and New York dated December 16, 1786. By that agreement the State of New York ceded, granted, released and confirmed to the State of Massachusetts, and to its grantees, and the heirs and assigns of such grantees forever, the right of preemption of the soil from the native Indians, and all other estate &c. therein belonging to the State of New York, excepting the right and title of government, sovereignty and jurisdiction.

Record, Marg. p. 18-20.

The ninth head of this agreement of cession empowers the Commonwealth of Massachusetts, by its authorized agents, to hold treaties and conferences with the native Indians to extinguish the Indian title.

The tenth head provides that Massachusetts may grant the right of preemption of the whole or any part of said lands and territories to any person or persons, *who by virtue of such grants shall have*

good right to extinguish by purchase the claims of the native Indians. It was stipulated that this agreement between Massachusetts and New York was duly ratified by the United States after the adoption of the Federal Constitution, and before August 31, 1826.

Record, marg. p. 16.

Prior to August 31, 1826, the State of Massachusetts had by sundry mesne conveyances, granted and conveyed its title and right of preemption in the lands in question to Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, commonly known as the Ogden Land Company.

Record marg. p. 10.

Prior to August 31, 1826, all the right of preemption and title of Massachusetts had been transferred to Troup, Ogden and Rogers, and on that day a treaty was held by them with the Seneca Nation of Indians, in the presence of Nathaniel Gorham, Commissioner, duly appointed by the Secretary of War for that purpose; at such treaty a contract or conveyance was made by the Nation with Troup, Ogden and Rogers whereby the Seneca Nation conveyed Eighty-seven Thousand acres of said lands to said Troup, Ogden and Rogers.

Marg. p. 11, pp. 12-14.

This conveyance was approved and confirmed by the State of Massachusetts. (See certified copy herewith submitted, of such confirmation.)

The defendant holds title from Troup, Ogden and Rogers and their grantees; and at the beginning of this action the defendant was in possession of these premises claiming under and by virtue thereof.

Soon after the making of said conveyance, the said

grantees, Troup, Ogden and Rogers, entered into full and exclusive possession of the lands described therein; and the same have been divided into parcels and sold and conveyed, and taxes have been from year to year imposed thereon.

Record, marg. p. 11-12.

The sum of Forty-three Thousand and fifty Dollars of the consideration set forth in said conveyance of August 31, 1826, was deposited in the Ontario Bank at Canandaigua, N. Y. under a deed of trust given by said Bank, dated April 21, 1827; afterwards, and in the year 1855, said principal sum was, pursuant to Section 3 of the Act of Congress, approved June 27, 1846, paid into the United States Treasury, and the lawful interest thereon has ever since been paid to and received by the plaintiff in error.

Record, marg. p. 13.

By a treaty between the Six Nations of Indians (which included the Senecas) and the United States, dated November 11, 1794, had at Canandaigua, N. Y., Timothy Pickering, acting as Commissioner in behalf of the United States, it was agreed that the lands of the Senecas situated in the western part of the State of New York, described in said treaty, and which included the lands described in the complaint, "shall remain theirs *until they choose to sell the* "*same to the People of the United States who have* "*the right to purchase.*"

The claim of plaintiff in error is that no right or title was conveyed by the conveyance made at the treaty held on August 31st, 1826, because it was not formally ratified by the Senate of the United States and proclaimed as such by the President of the United States.

FIRST.

This court has no jurisdiction of the writ of error to the State Court of New York, for the reason that it does not appear affirmatively that the judgment rendered by the State Court could not have been given without deciding a Federal question.

The complaint is verified the 1st day of December, 1885, and the answer the 11th day of January, 1886. Full possession had been given of all the lands described in the conveyance prior to 1832, and more than fifty years before this action.

Record, Marginal p. 12.

The only authority for the Seneca Nation of Indians as a community or corporate body to maintain an action of this character, is Chapter 150 of the Laws of 1845 of the State of New York, (Rev. Stat. (7th Ed.) p. 295) Section 1 of that act provides: "That the Seneca Indians residing on the "Allegheny and Cattaraugus Reservations in this "State shall be deemed to hold and possess the said "Reservations as a distinct community, and, in and "by the name of the Seneca Nation of Indians, may "prosecute and maintain in all courts of law or "equity in this State any action, suit or proceeding "which may be necessary or proper to protect the "rights and interests of the said Indians, and of the "said Nation in and to the said Reservations, and "especially may maintain any action of ejectment to "recover the possession of any part of said Reserva- "tions unlawfully withheld from them, &c., &c.; and "where such injury has been heretofore sustained, or "any such damages have heretofore been suffered by "the said Indians in common, or as a Nation, actions "therefor, and to recover damages for such wrongs "may likewise be brought and maintained as herein

"provided, in the same manner and *within the same* "*time* as if brought by citizens of this state in rela- "tion to their private individual property and "rights."

Neither the whole, nor any part of the Seneca Indians could maintain any action of this character, except by virtue of this statute.

Strong vs. Waterman, 11 Paige, 607.
Cayuga Nation of Indians vs. State of New York, 99 N. Y., 235.

The lapse of time was alleged in the answer as a bar to this action, and it was so decided by the Court of Appeals.

Record, Marginal p. 111.

This court therefore has no jurisdiction of the writ of error.

Johnson vs. Risk, 137 U. S., 300.
Rector vs. Ashley, 6 Wallace, 142.

The time within which a suit may be brought under a State Statute, is a question to be determined by the State Court, and its decision will be accepted as final in this court.

Harpending vs. Dutch Church &c., 16 Peters, 455, 493.
De Saussure vs. Gaullard, 127, U. S., 216.
Bardon vs. L. & R. Improvement Co., 157, U. S., 327.

As, however, the title to about 87,000 acres of lands in Western New York, most of which is improved and occupied with farms and villages, is challenged by this action, it is desirable for the quieting of the title to this large body of valuable lands,

that this cause should be decided by this court upon the merits rather than by a dismissal of the appeal. The case in both its legal and historical aspects has been considered with such fullness and ability in the opinion of Judge Andrews in the New York Court of Appeals, contained in the printed record, that only a summary of the argument on the merits will be attempted to be presented in this brief.

SECOND.

The action is barred by the Statute of Limitations.

This Statute is expressly applied to all actions which the enabling act, passed by the Legislature of the State of New York, and quoted from in head I, above, permits the plaintiff to maintain. By the decision of the New York Court of Appeals, the Statute of Limitations is held a bar to this case, and such interpretation of the State Statute will be held conclusive in this court. (See authorities cited under first head of this brief.)

1. It has been strenuously argued on behalf of the plaintiff in error, that in a certain peculiar sense the Indians have been considered as wards of the Nation, and that therefore, they are under the like disabilities as minors, and that the Statute of Limitations cannot run against them.

In respect to bringing actions, the Nation is given the standing of a white citizen, by the act above quoted from.

Moreover, this principle has been invoked and applied only for their defense and protection, as a shield and not as a sword.

Furthermore, their state of wardship or dependence, and its nature and extent is now contained in

and evidenced by the federal statutes. No statute has been pointed out which enables a tribe or community of Indians, to escape all defences, as minors or wards, and obtain judgment as citizens.

2. The Statute of Limitations is a statute of peace adopted as a matter of public policy to secure the quieting of titles, and to prevent the frauds which would inevitably result from the investigation of titles long after the title originated.

Unless persons are under the disabilities expressly mentioned in the Statute of Limitations, they cannot be exempted from its operations by judicial construction.

McIvor vs. Ragan, 2 Wheaton, 25.
Harpending vs. Dutch Church, &c., 16 Peters, 455, 493.
Humbert vs. Trinity Church, 24 Wend., 587.
Bogardus vs. Trinity Church, 4 Paige, 178.
Green vs. Niel, 6 Peters, 291.
Angell on Limitations, Secs. 194, 476.

The rule barring claims of title after long lapse of time has been applied against Indians as well as against Whites. The rule is laid down in the leading case of Mitchell vs. U. S., 9 Peters, 711, 760, as follows:

"On the same principle, after a long possession of "Indian lands, the law would presume that it was "founded upon Indian deed duly affirmed, or any "title consistent with the facts and circumstances in "evidence. (1 Paine, 469, 470) Anything which "would make the ancient appropriation good (Cow- "per 110), if it could have been the lawful founda- "tion of whatever may commence by grant, is good "by prescription."

Stone vs. U. S., 69 U. S., 525.
State of Indiana vs. Kentucky, 136, U. S., 519.

Most of the lands within all the states and territories were originally occupied by the Indians. If the principle claimed by the plaintiff in error were to prevail, the title to nearly all the lands in the United States could at any time be brought in question by persons claiming under or in the name of Indians, or tribes of Indians.

THIRD.

The title to the lands of the defendant in error, and of the other lands brought in question by this action, rests securely, however, upon other facts and considerations.

The Indian title thereto was extinguished in substantially the same manner as most other Indian titles have been extinguished within the original thirteen States since the formation of the Federal Constitution. The title was not challenged within the period of the Statute of Limitations, and not until long after that period had expired, for the reason, it may fairly be presumed, that while the facts were easy of proof, and the questions involved were frequently discussed and well understood, it was not believed that any question could be successfully raised.

The nature and legal character of the Indian title, and of the title of the civilized nations who were the discoverers of this Continent, was first authoritatively set forth by Chief Justice Marshall in the case of Johnson vs. McIntosh, 8 Wheaton, 543. The principle of that opinion, and its relations to the question involved in this action, are very clearly and ably set forth in the opinion of Judge Andrews of the New

York Court of Appeals, in the opinion in the case at bar. (Printed Record, marg. p. 96, 103.)

The case is reported in 126, N. Y., 122.
Mitchell vs. U. S., 9 Peters, 711, 745-8.
U. S. vs. Kagama, 118, U. S., 375.
Harcourt vs. Gaillard, 12 Wheaton, 523, 6.

The principle of these decisions may be briefly stated as follows:

The absolute title in fee to the soil of all the Indian lands upon this Continent, upon discovery followed by possession, vested in the sovereign by whose subjects such lands were discovered; such title was subject only to the Indian right of occupancy; and as to all Indian lands within the 13 original states, such title in fee vested at the close of the War of the Revolution in the governments of those states in which the lands were situated.

Clark vs. Smith, 13 Peters, 195.
Latimer vs. Potect, 14 Peters 4.
S. P. Holden vs. Joy, 84 U. S., 211.

"While the different nations of Europe respected "the right of the natives as occupants, they asserted "the ultimate right to be in themselves; and claimed "and exercised, as a consequence of this ultimate do- "minion, a power to grant the soil while yet in the "possession of the natives. These grants have been "understood by all to convey a title to the grantees "subject only to the Indian right of occupancy. The "history of America since its discovery to the present "day, proves, we think, the universal recognition of "this principle."

Johnson vs. McIntosh, 8 Wheaton, 543.

"There was (at the Treaty of Peace with Great "Britain) no territory within the United States that

"was claimed in any other right than that of some "one of the confederated states; therefore there could "be no acquisition of territory made by the United "States distinct from, or independent of some one of "the states."

Harcourt vs. Gaillard, 12 Wheaton 524.

The title of the Indians to the soil was founded upon simple occupancy by a particular tribe or nation of Indians; the Indians had no power to dispose of such right, except to the sovereign, or one who had acquired from the sovereign the White Man's title, which carried with it the exclusive right of preemption or of extinguishing the Indian title. "The possession when abandoned by the Indians, "attaches itself to the fee without further grant."

Cases cited above.
U. S. vs. Cook, 19 Wallace, 591.
Bucher vs. Wetherbee, 95 U. S., 517.
Strong vs. Waterman, 11 Paige (N. Y.), 607.
Howard vs. Moot, 64 N. Y. Rep., 270.
3 Kent's Comm., 79, 80.

It is among the conceded facts in the case, that by the compact of 1786, between New York and Massachusetts, the title in fee and the right of preemption and extinguishing the Indian title to a large tract of lands in Western New York, including those in question in this action, became vested in the State of Massachusetts; that after the formation of the Federal Constitution that compact was ratified and confirmed by the Government of the United States; that subsequently, and before 1826, all the right and title of Massachusetts to the lands in question had been transferred to and vested in Troup, Ogden and Rogers (commonly known as the Ogden Land Company); that at the treaty held on August 31, 1826, a

conveyance was made and executed by the Seneca Nation of Indians to said Troup, Ogden and Rogers of a portion of said tract, which embraced the lands in question, and that the defendant in error obtained title to the lands described in the complaint herein by sundry mesne conveyances from said Troup, Ogden and Rogers; that after said conveyance of August, 1826, the lands included therein were surrendered by the Seneca Nation pursuant to said conveyance, to said Troup, Ogden and Rogers, and was by them subdivided and conveyed to various persons, and have ever since been occupied by them or their grantees, and taxes levied thereon, and paid by such grantees; and that after such conveyance of 1826, a boundary line was marked and established between the lands conveyed by such conveyance of 1826, and the lands not conveyed thereby, but retained by the Seneca Nation.

The title of defendant in error is therefore clear and absolute, if the Indian title passed by the conveyance of 1826, or if, under the circumstances disclosed, the Seneca Nation was debarred at the beginning of this action from asserting title thereto against such conveyance.

2. The plaintiff in error rests upon the claim that under the law of 1802, regulating intercourse with the Indian tribes, no valid agreement for extinguishing the Indian title could in any way be made with an Indian tribe by any state, or by citizens of any state, and that a valid agreement therefor could only be made by a constitutional treaty to which the United States was a party, ratified by the Senate and proclaimed by the President as a treaty of the United States; and that therefore the conveyance made at the treaty of 1826, was absolutely void. This claim is rested upon the third clause of Section 8, Title I of

the Federal Constitution, by which power is given to Congress "to regulate commerce with foreign nations "and among the several states, and with the Indian "tribes," and the acts of Congress in pursuance of the authority given thereby.

The first Indian Intercourse Act was passed July 22, 1790, and Section 4 thereof is as follows:

"And be it enacted and declared that no sale of "lands made by any Indians, or any Nation or Tribe "of Indians within the United States, shall be valid "to any person or persons, or to any state, whether "having the right of preemption to such lands or not, "unless the same shall be made and duly executed at "some public treaty, held under the authority of the "United States."

The next act which was passed in 1793, is the same except that it omits the words "or to any state, "whether having the right of preemption of such "lands or not."

On May 17th, 1796, a new Act was passed, Chapter 30, Laws of 1796, 1 Statutes at Large, p. 472. Section 12 reads as follows: "And be it enacted, "that no purchase, grant, lease or other conveyance "of lands, or of any title or claim thereto from any "Indian, or Nation, or Tribe of Indians within the "bounds of the United States, shall be of any validity "in law or equity unless the same be made by treaty "or convention entered into pursuant to the Consti- "tution; and it shall be a misdemeanor in any person "not employed under the authority of the United "States to negotiate such treaty or convention, di- "rectly or indirectly to treat with any such Indian "Nation or Tribe of Indians for the title or purchase "of any lands by them held or claimed, punishable

"by fine not exceeding One Thousand Dollars, and "imprisonment not exceeding twelve months; Pro- "vided, notwithstanding, that it shall be lawful for "the agent or agents of any State who may be pres- "ent at any treaty held with Indians under the au- "thority of the United States in the presence and "with the approbation of the Commissioner or Com- "missioners of the United States appointed to hold "the same, to propose to and adjust with the Indians "the compensation to be made for their claims to "lands within such State which shall be extinguished "by the treaty."

This was re-enacted in 1799 and 1802.

The word "treaty" has two meanings, as follows: (1). Negotiation: *act of treating* for the adjustment of differences or for confirming an agreement.

(2). An agreement, league or contract between two or more nations or sovereigns formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns, or by the supreme power of each state.—*Webster's Dictionary.—Treaty.*

A treaty in the first sense would be properly stated as "held," and this is the sense in which the word is used in Section 4, above quoted from the Act of 1790, and in second paragraph of law of 1796; in the second sense of the word, a treaty is said to be "entered into or made," and it is in this latter sense in which the word is obviously used in the first clause of the Act of 1796, above quoted.

The proper interpretation of these acts, and an understanding of the meaning of the changes made in 1793 and 1796 may be better obtained by referring to the conditions to which they applied.

3. At the adoption of the Federal Constitution the general fact was, that as to *all Indian lands within the limits of the 13 states*, the state within which the lands were situated was the owner of the fee, and held the exclusive right to extinguish the Indian title. As to all lands not included within the 13 states, the United States, by virtue of cessions from the different states, was or became the owner of the fee, and held the exclusive right to extinguish the Indian title. The United States could not, therefore, purchase or acquire, by treaty or otherwise, the Indian title to any lands within the states; and neither any state, nor any of its citizens or grantees could directly treat for or acquire the Indian title to lands not within its limits. The United States, therefore, could deal as owner with all Indian lands not within the 13 states, and with all that it thereafter acquired by purchase from France and Spain.

Until the great opinion of Chief Justice Marshall in Johnson vs. Macintosh, in 1823, the nature and extent of the respective titles of the Indians and White men to the same lands had never been fully worked out and definitely formulated.

The Act of 1790 did not attempt to establish any method of procedure by which the United States should extinguish the Indian title to the lands outside of the 13 states; and it appeared to imply by the clause which was omitted in 1793, that persons or states who had not the right of preemption could acquire the Indian title; (this was erroneous—See Johnson vs. Macintosh), it was also made applicable to the States, which, as already stated, held the right of preemption to all the lands within their borders. This statute simply required all purchases to be made at a public treaty held under Federal supervision.

The statutory restriction upon the action of *the States* was wholly removed by the amendment of 1793. It is a well known fact of history, that between that date and 1800, there was a general migration westward from the old 13 states, and many persons and companies were eager to acquire lands held by the United States in the territories west of the old 13 states. Many Indian difficulties, and one or more costly Indian wars were caused thereby.

In 1796 the statute was enacted which is above quoted. This, by the first clause, established a general rule that the Indian title could only be extinguished by treaty or convention entered into pursuant to the Constitution, and made it a misdemeanor for any person not employed under the authority of the United States to negotiate such treaty or convention, ,or treat with the Indian tribes for their lands.

The second clause, however, established an entirely different rule for the extinguishing of the Indian title by those acting under the authority of any *state*, and seeking to extinguish the Indian title to lands *within such state*. As to such cases no constitutional treaty was required, but only, that those acting under the authority of the state, shall make their contract with the Indians *at* a treaty *held with* the Indians under the authority of the United States in the presence and with the approbation of a United States Commissioner appointed to hold the same. The first clause, therefore, was applicable to all Indian lands within the *territories* of the United States, and for the first time prescribed by statute a mode by which the United States Government, which alone had the right of preemption, would proceed to acquire the Indian title to such lands, to wit-by a con-

stitutional treaty made by the President, and confirmed by the Senate.

As to the case of lands within the states, to which the United States had no right of preemption, which right was vested in the states respectively, that right of the states is recognized, and the United States, under the Constitutional provision authorizing it to regulate intercourse with Indian tribes, prescribed a supervision by its Commissioner or Commissioners, to be exercised at a treaty *held with* the Indians for the purchase of their lands. The first clause contemplates a treaty to which the United States should be a party, by which it would acquire, for itself or others, the Indian title; the second contemplates the acquiring of the Indian title, by those having the right of preemption from the state at a public treaty held under the authority of the United States, at which it should be represented by its commissioner.

This was a continuance, so far as the land within the states was concerned, of the Federal supervision prescribed by the Act of 1793, which was itself a continuance of the rule that had obtained from the discovery of the country.

"It was a universal rule, that purchases made at "Indian Treaties in the presence, and with the appro- "bation of the officer under whose direction they "were held, by authority of the Crown, gave a valid "title to the lands; it prevailed under the laws of the "states after the Revolution, and yet continues in "those where the ultimate fee is owned by the states "or their grantees."

Mitchell vs. U. S., 9 Peters, 711, 747.

This followed the rule of European nations that the acquisition of new territory, by conquest or

treaty, was the act of the Crown; our Constitution followed this precedent by giving to the President, as the chief executive, the sole power to make treaties giving, however, to the Senate, the right to veto or confirm.

5. No other construction of these Statutes is permissible or reasonable, for the following reasons, which need only be briefly summarized: (1.) If, as the plaintiff in error claims, a Constitutional treaty was intended to be required as to all lands alike, whether in the states or within the territories, then the *proviso contained in the second clause is wholly without meaning*. By its terms it is an entirely different provision applying only to lands within the States and would have been omitted. The United States did not intend to assume and assert title in itself to Indian lands within the old thirteen States. (2.) The Constitution does not authorize or contemplate the ratification by the Senate, or proclamation by the President, of a private contract or conveyance *to which the United States is not a party*. The argument of the plaintiff in error admits that this conveyance would have been valid if ratified by the Senate. (3.) These different provisions accord with the different conditions. During the administrations of Washington and John Adams there was constant peril of Indian wars along our whole Western frontier, by the encroachments upon lands held or claimed by Indians, of pioneers and adventurers and speculators. Over all this territory the National government had exclusive sovereignty and authority; and in the interests of peace and public safety and order it ordained by the acts of 1796 and 1802 that in all these territories only the President or his Commissioners should even attempt to purchase the Indian title; but within the States the National Government had

only the right "to regulate commerce with the Indian tribes," and no right to acquire the Indian title, and the Statute therefore only established a Federal supervision within the states to be exercised by the Executive in the interests of peace and fair dealing, over contracts of purchase to be made by those who had acquired the right to purchase from the State.

6. This interpretation has been placed upon these statutes from the time of their passage to the beginning of this action, both by the courts, and by the executive officers of the Federal Government.

See Mitchell vs. U. S., 9 Peters 711, 745-6.
Also opinion of Judge Andrews in the case at bar, 126 N. Y., 137 et seq.

In 1797 Robert Morris purchased about four millions of acres embracing nearly all the Western counties of the State of New York. His contract of purchase began as follows: "Contract entered into under the sanction of the United States of America, between Robert Morris and the Seneca Nation of Indians," and recites: "And Whereas, *at* a treaty *held* under the authority of the United States &c." It was executed as a contract, and approved by the commissioners of the United States and of Massachusetts substantially as was the contract of 1826.

7 U. S. Stat. at Large, p. 601-3.

See messages of President Washington distinguishing between treaties entered into by the United States, and a treaty held on behalf of a state with Indian tribes.

American State Papers, Indian Affairs, Vol. 1, p. 586.
Ibid p. 626.
Message of President Monroe, Feb. 25, 1822.

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2 Am. State Papers, Indian Affairs, 323.

Between the years 1796 and 1850 about forty agreements for the acquiring of Indian title to Indian lands were made between agents appointed by the State of New York, and the various Tribes of Indians, or individual Indians within its borders, for the extinguishment of the Indian title to lands within the State. None of these agreements purported to be a constitutional treaty between the Indians and the United States Government, and but few of them were submitted to the United States Senate for its action

See report of Special Committee to investigate the Indian Problem of the State of New York appointed by the Assembly of 1888, Appendix D, p. 190-381. See also agreement of September 3, 1823, between the Seneca Nation of Indians and John Gregg and Henry B. Gibson at Moscow, Livingston Co., N. Y. for the purchase from the Indians of Gardeau Reservation, containing about 16,600 acres.

Indian Treaties 1837, p. 305-7.

The foot-note shows that this was not laid before the Senate.

See report of Superintendent of Indian Affairs with reference to the contract in question in this action.

Printed Record pp 18-19.

Proceedings of the Senate, Printed Record, marg. p. 35.

There are numerous legislative enactments passed by the Legislature of New York authorizing its officers and citizens to acquire Indian lands within the State. Similar legislation was had in the State of Massachusetts, and, it is presumed, in most of the

other original 13 states, which legislation is a part of the public history of the country.

7. Contemporary interpretation practiced and acquiesced in for years conclusively fixes the construction of the Constitution or a statute.

Stuart vs. Laird, 1 Cranch, 308.
Martin vs. Hunter, 1 Wheaton, 304.
Burrow-Childs Lithographic Co. vs. Sarony, 111 U. S., 53.
Pollock vs. Bridgeport Steamboat Co., 114 U. S., 411.

The treaty at which the lands in question were purchased from the Seneca Nation was held under the authority of the United States, was certified and approved by the Commissioners of the United States and of Massachusetts, and the purchasers had full and unquestioned authority from both the States of New York and of Massachusetts to make such purchase. The purchase was therefore made and executed in conformity with the Indian Intercourse Act of 1802.

FOURTH.

If this purchase by the holders of the right of preemption needed any recognition or confirmation from the Government of the United States it received such recognition and confirmation by Section 3, of Chapter 34, of the Laws of Congress of 1846, set forth in the Statement of Facts herein.

By virtue of this Act of Congress, the funds which had been theretofore held by the Ontario Bank in trust for the Indians, was paid into the Treasury of the United States, and the Treasury has ever since paid the annual interest thereon to the plaintiff in error. This was a recognition and affirmance of the

validity of the conveyance of 1826 by both houses of Congress, and the President, and also by the Seneca Nation. It gave the recognition and assent of the United States Government as a whole, and of the Seneca Nation twenty years after the conveyance in question. If the assent and approval of the United States was needed, this was a sufficient assent and approval.

Holden vs. Joy, 84 U. S., 211.

FIFTH.

The title to all the lands in Western New York reserved to the Six Nations by the Pickering Treaty of 1795, may be safely rested upon the express power of sale given, by the United States to the Six Nations, by Article 3, of that Treaty.

Record p. 17, 7 U. S. Stat. at Large, pp. 44-7.

That treaty was made after the Indian Intercourse Act of 1790 had come in force, and after its amendment in 1793.

It was from the beginning optional with our National Government whether to make treaties with the Indian Tribes, or to govern them as dependent communities by legislative enactments. The latter course was adopted by the act of Congress of March 3, 1871, which speaks of Indian treaties as "contract by treaty." But treaties theretofore made with Indian Tribes, as prescribed in the Constitution, have been uniformly held to have the same force and effect as treaties with foreign nations, and by the Constitution are the supreme law of the land.

Article 3, of the Pickering Treaty acknowledged the Indian title to all the lands described therein, and concludes "but it shall remain theirs until they choose

"to sell the same to the people of the United States, "who have the right to purchase." This was a contract by which the United States government yielded to the Six Nations the unrestricted right to make sale of their lands at their own option to those people of the United States who held the right of preemption.

Furthermore, by the compact of 1786 between New York and Massachusetts, the right to extinguish the Indian title had been expressly conceded to Massachusetts and to its grantees, such extinguishment to be under the supervision of the Massachusetts authorities (Printed Record marg. p. 18-20); and it is conceded that this compact was recognized and confirmed by the National Government. In the absence of any express provision in the Indian Intercourse Act of 1796 and 1802, taking away from the Indians the unrestricted right of sale given by this treaty, these acts must be construed as subordinate to the treaty, and as not intended to break the contract which the Government had made by it. Such effect would not be given to the general provisions of the Statute by mere construction or implication.

Holden vs. Joy, 84 U. S., 247-250,
citing cases.
U. S. vs. Thomas, 151 U. S., 577.

The two previous treaties with the Six Nations, to-wit, at Fort Stanwix in 1784, and at Fort Harmar in 1789, had neither of them contained any such power to sell; and it is to be noted that by this treaty it is left entirely to their choice as to when and how they will sell, and to whom they will sell, except that it is limited to those people of the United States who have acquired from the state the right to extinguish the

title to those particular lands, thereby submitting the matter wholly to the state authorities.

This view is strongly corroborated by the historical facts heretofore mentioned, and those referred to in Judge Andrews' opinion. The Indian title to the larger portion of these lands has been in fact extinguished under the laws, and by the officials of the State of New York, without any recourse to the general government; and the nature of the Indian title being simply that of occupancy, and it being conceded that the Indians had the right by treaty, to sell their lands to whoever should hold the preemption right and that the Ogden Land Company had the right of preemption of the same lands, and that pursuant to such purchase and sale the Indians actually surrendered possession of the lands, it necessarily follows that the Indian title was thereby extinguished. When an Indian Tribe abandons its right of possession to the holders of the preemption right, the Indian title attaches itself to the fee without further grant.

U. S. vs. Cook, 19 Wallace, 591.
Bucher vs. Wetherbee, 95 U. S., 517.
Johnson vs. McIntosh, 8 Wheaton, 543.
Howard vs. Moot, 64 N. Y. 270.
Strong vs. Waterman, 11 Paige, 607.
3 Kent's Com., 79, 80.

SIXTH.

The title of defendant in error, and others holding under the grant made by the conveyance or treaty of 1826, is attacked upon the single ground that such conveyance or "treaty" was not ratified by the United States Senate as a constitutional treaty.

This attack, if successful, would destroy the title under which that great body of lands in Western New

York is now held, which was described in the Pickering Treaty of 1795. It would also destroy the title to other considerable tracts of land in the State of New York to which the Indian title was extinguished under the authority of the State, as the original and exclusive holder and owner of the right of preemption, by the officials or grantees of the State, by methods prescribed mainly by State legislation. At the adoption of the Federal Constitution there were large bodies of lands in most of the other 13 states to which the Indian title had not then been extinguished, and, it is presumed that there were such lands in all the 13 states, except possibly New Jersey, Delaware and Maryland. It is presumed, without special investigation, that the same methods of extinguishing the Indian title without a constitutional treaty, but generally under supervision of the Federal authorities, and in reliance upon the State ownership of the right of preemption, was pursued in most of the other states. If this action is maintained it would at once unsettle the title to every acre of land in the original 13 states the title to which was not extinguished by a constitutional treaty made by the United States, and formally ratified by the United States Senate. Most of the lands thus situated have been held under the faith of similar conveyances made by the Indian Tribes for from fifty to one hundred years, and have been cleared and improved, and occupied with farms, villages and cities. They are in fact held by ancient title. The generations of men, both Whites and Indians, by whom the conveyances were made, have long since passed away: and the only investigation which can now be made of them, must be based on public documents and records.

For the purpose of quieting the titles to property,

it has long been held as a rule of law based upon manifest public policy, that titles shall not be open to question and attack after the lapse of long periods of time, which by the Statutes of New York has long been fixed at twenty years. More than fifty years elapsed, after possession of all the lands in question in this action had been surrendered by the Seneca Nation, before this action was begun. If there were substantial doubt whether the requirements of law had been fully complied with in extinguishing this title, the plaintiff in error would still be debarred from now bringing this title into question.

It appears, however, upon the conceded facts in the case, that the action is barred by the provisions of the very statute under which alone the plaintiff in error can allege the right to maintain the action; that the provisions of the Indian Intercourse Act upon which the action claims to be based, were conformed to, in spirit and in substance; that by the Pickering Treaty, which was a Constitutional treaty to which the United States and the Seneca Nation were both parties, the right was solemnly confirmed to the Indians to sell to the persons who became the purchasers of these lands in 1826; and that thereafter both the Government of the United States and the Seneca Nation recognized the validity of the purchase and sale made by the conveyance of 1826, and waived any objections to its validity.

FINALLY.

The judgment of the court below should be affirmed with costs; and as the defendant in error was compelled under the rule to print the record at his own expense to bring on a motion to dismiss the appeal and to affirm the judgment, the costs of printing, and

the Clerk's fee for supervising should also be included in the award of costs to the defendant in error.

NORRIS MOREY,

Attorney for Defendant In Error.